Draft
Personal Property
Security Act

Province of British Columbia
Ministry of Finance and Corporate Relations

MINISTER OF FINANCE AND
CORPORATE RELATIONS.

DRAFT PERSONAL PROPERTY SECURITY ACT

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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

PART 1
INTERPRETATION AND APPLICATION

Interpretation

1. In this Act

"accessions" means goods that are installed in or affixed to other goods;

"account" means a monetary obligation not evidenced by chattel paper, an instrument or a security, whether or not it has been earned by performance;

"building" includes a structure, erection, mine or work built, constructed or opened on or in land;

"building materials" includes goods that are incorporated or built into a building so that their removal

(a) would necessarily involve the removal or destruction of some other part of the building and cause substantial damage to the building apart from the loss of value of the building resulting from the removal, or

(b) would result in weakening the structure of the building or exposing the building to weather damage or deterioration,

but does not include heating, air conditioning or conveyancing devices or machinery installed in a building or on land for use in carrying on an activity inside the building or on the land;

"chattel paper" means one or more writings that evidence both a monetary obligation and a security interest in or a lease of specific goods or specific goods and accessions but does not include a security agreement providing for a security interest in specific goods and after-acquired goods other than accessions;

"collateral" means personal property that is subject to a security interest;

"commercial consignment" means a transaction under which goods are delivered for sale, lease or other disposition to a consignee who, in the ordinary course of the consignee's business, deals in goods of that description, by a consignor who,

(a) in the ordinary course of the consignor's business, deals in goods of that description, and

(b) reserves an interest in the goods after they have been delivered

but does not include an agreement under which goods are delivered to an auctioneer for sale or to a consignee for sale, lease or other disposition if it is generally known to the creditors of the consignee that he is in the business of selling or leasing goods of others;

"consumer goods" means goods that are used or acquired for use primarily for personal, family or household purposes;

"court" means the Supreme Court;

"creditor" includes an assignee for the benefit of creditors and an executor, administrator or committee of a creditor;

"crops" means crops, whether matured or otherwise, and whether naturally grown or planted, attached to land by roots or forming part of trees or plants attached to land, but does not include trees;

"debtor" includes a person who owes payment or performance of an obligation secured, whether or not that person owns or has rights in the collateral, and includes one or more of the following:

(a) a person who receives goods from another person under a commercial consignment;

(b) a lessee under a lease for a term of more than one year;

(c) a transferor of an account or chattel paper;

(d) except in the definition of "purchase money security interest" and in sections 7, 8 (1), 10, 11, 22, 29, 34, 35 (8), 39, 43, 59, 60, 61 and 62 (1) (b), a transferee of or successor to a debtor's interest in the collateral,

and, if the debtor and the owner of, or person with an interest in, the collateral in which the security interest is taken are not the same person, the debtor is deemed to be either an owner of, or person with an interest in, the collateral in any provision of this Act dealing with the collateral, or an obligor in any provision of this Act dealing with the obligation, or both, where the context requires;

"default" means the failure to pay or otherwise perform the obligation secured when due or the occurrence of an event or set of circumstances that, under the terms of the security agreement, cause the security interest to become enforceable;

"document of title" means a writing issued by or addressed to a bailee that covers goods in the bailee's possession that are identified or are fungible portions of an identified mass, and in which it is stated that the goods identified in it will be delivered to a named person or the transferee of the person or to bearer or the order of a named person;

"equipment" means goods that are held by a debtor other than as inventory or consumer goods;

"financing change statement" means a writing in prescribed form;

"financing statement" means a writing in prescribed form required or permitted to be registered under this Act and, where the context requires, includes a financing change statement and a security agreement registered prior to the date this Act comes into force;

"fixture" does not include building materials;

"future advance" means the payment of money, the provision of credit or the giving of value secured by a security interest, whether or not given pursuant to a commitment, and includes advances and expenditures made for the protection, maintenance, preservation or repair of the collateral;

"goods" means tangible personal property other than chattel paper, a document of title, an instrument, a security or money, and includes fixtures, crops and the unborn young of animals, but does not include trees until they are severed or oil, gas or minerals until they are extracted;

"instrument" means

(a) a bill of exchange, note or cheque within the meaning of the *Bills of Exchange Act* (Canada),

(b) any other writing that evidences a right to payment of money and is of a type that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment, or

(c) a letter of credit or an advice of credit if the letter of credit or advice of credit states on it that it must be surrendered on claiming payment,

but does not include chattel paper, a document of title or a security;

"intangible" means personal property other than goods, chattel paper, a document of title, an instrument, money or a security;

"inventory" means goods that are

(a) held by a person for sale or lease, or that have been leased,

(b) to be furnished or have been furnished under a contract of service,

(c) raw materials or work in progress, or

(d) materials used or consumed in a business;

"knowledge" means information acquired under circumstances in which a reasonable person would take cognizance of it, and

(a) a partnership has knowledge when information has come to the attention of one of the general partners or person having control or management of the partnership business under circumstances in which a reasonable person would take cognizance of it, and

(b) a corporation or an association has knowledge when information has come to the attention of

(i) a managing director or officer of the corporation or association, or

(ii) a senior employee of the corporation or association with responsibility for matters to which the information relates,

under circumstances in which a reasonable person would take cognizance of it, or when the information in writing has been delivered to the registered office of the corporation or attorney for the corporation;

"lease for a term of more than one year" includes

(a) a lease for an indefinite term even though the lease is determinable by one or both of the parties not later than one year from the date of its execution,

(b) a lease for a term of one year or less that is automatically renewable or that is renewable at the option of one of the parties or by agreement for one or more terms, the total of which may exceed one year, and

(c) a lease for a term of less than one year where the lessee retains uninterrupted or substantially uninterrupted possession of the goods leased for a period in excess of one year after the day the lessee first acquired possession of them, but the lease does not become a lease for a term of more than one year until the lessee's possession extends for more than one year

but does not include

(d) a lease involving a lessor who is not regularly engaged in the business of leasing,

(e) a lease of household furnishings or appliances as part of a lease of land where the goods are incidental to the use and enjoyment of the land, or

(f) a lease of prescribed goods, regardless of the length of the lease term;

"money" means a medium of exchange authorized by the Parliament of Canada or authorized or adopted by a foreign government as part of its currency;

"obligation secured" means, when determining the amount payable under a lease that secures payment or performance of an obligation,

(a) the amount originally contracted to be paid under the lease,

(b) any other amount payable pursuant to the terms of the agreement, and

(c) any other amount required to be paid by the lessee to obtain ownership of the collateral

less any amount paid prior to the determination;

"pawnbroker" means a person who engages in the business of granting credit to individuals for personal, family or household purposes and who takes and perfects security interests in consumer goods by taking possesion of them, or who purchases consumer goods under agreements or undertakings, express or implied, that the goods may be repurchased by the sellers;

"person" includes an association;

"proceeds" means identifiable or traceable personal property in any form and fixtures or crops derived directly or indirectly from any dealing with the collateral or proceeds of the collateral, and includes

(a) a right to an insurance payment or any other payment as indemnity or compensation for loss or damage to the collateral or proceeds, and

(b) a payment made in total or partial discharge or redemption of an intangible, an instrument, a security or chattel paper

and money, cheques, drafts and deposit accounts in deposit-taking institutions are cash proceeds and all other proceeds are non-cash proceeds;

"purchase" includes taking by sale, lease, discount, negotiation, mortgage, pledge, lien, issue, reissue, gift or any other consensual transaction creating an interest in property;

"purchase money security interest" means

(a) a security interest taken in collateral to the extent that it secures payment of all or part of its purchase price,

(b) a security interest taken in collateral by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire the rights,

(c) the interest of a lessor of goods under a lease for a term of more than one year, and

(d) the interest of a person who delivers goods to another person under a commercial consignment

but does not include a transaction of sale by and lease back to the seller, and, for the purposes of this definition, "purchase price" and "value" include credit charges or interest payable for the purchase or loan credit;

"receiver" includes receiver-manager;

"registrar" means the registrar of the Personal Property Registry designated under section 42;

"registry" means the Personal Property Registry under section 42;

"secured party" means

(a) a person who has a security interest,

(b) the trustee, if a security interest is embodied in a trust indenture,

and, in sections 17, 55, 56, 57, 58, 59 (1), (3), (12) and (15), 60, 62 (1) (a), 63 and 69, includes a receiver;

"security" means a share, stock, warrant, bond, debenture or similar document

(a) that is in a form recognized in the area in which it is issued or dealt with as evidencing a share, participation or other interest in property or an enterprise, or

(b) that evidences an obligation of the issuer and that in the ordinary course of business is transferred by delivery with the necessary endorsement, assignment or registration in the records of the issuer or agent for the issuer, or by compliance with restrictions on transfer,

and includes an uncertificated security within the meaning of the *Company Act* or any other law relating to business corporations;

"security agreement" means an agreement that creates or provides for a security interest and, if the context permits, includes a writing that evidences a security agreement;

"security interest" means an interest in goods, a document of title, a security, chattel paper, an instrument, money or an intangible that secures payment or performance of an obligation, and, except as otherwise provided, includes

(a) an interest arising from the transfer of an account or chattel paper,

(b) the interest of a person who delivers goods to another person under a commercial consignment, and

(c) the interest of a lessor under a lease for a term of more than one year,

notwithstanding that the interest described in paragraphs (a), (b) and (c) do not secure payment or performance of an obligation, but does not include the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or the equivalent to the order of the seller or to the order of an agent of the seller, unless the parties have otherwise evidenced an intention to create or provide for a security interest in the goods;

"specific goods" means goods identified and agreed on at the time the agreement in respect of those goods is made;

"trust indenture" means a deed, indenture or document, however designated, by the terms of which a person issues or guarantees or provides for the issue or guarantee of debt obligations secured by a security interest, and in which another person is appointed as trustee for the holders of the debt obligations issued, guaranteed or provided for under the deed, indenture or document;

"value" means any consideration sufficient to support a simple contract, and includes an antecedent debt or liability.

Scope of Act: security interests

2. (1) Subject to section 4, this Act applies to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to any collateral.

(2) Without limiting the generality of subsection (1) and subject to section 4, this Act applies to a chattel mortgage, conditional sale, floating charge, pledge, trust indenture, trust receipt, assignment, consignment, lease, trust and transfer of chattel paper where they secure payment or performance of an obligation.

Scope of Act: non-security interests

3. Subject to sections 4 and 55, this Act applies to a transfer of an account or chattel paper, a lease for a term of more than one year and a commercial consignment, notwithstanding that the transfer, lease or consignment does not secure payment or performance of an obligation.

Exclusions from scope of Act

4. Except as otherwise provided, this Act does not apply to the following:

(a) a security agreement governed by a statute of the Parliament of Canada that deals with rights of parties to the agreement or the rights of third parties affected by a security interest created by the agreement, and any agreement governed by Division B of the *Banks and Banking Law Revision Act, 1980* (Canada);

(b) a lien, charge or other interest given by statute or rule of law;

(c) the transfer of an interest or claim in or under a contract of annuity or policy of insurance except a right to money or other value payable under a policy of insurance as indemnity or compensation for loss of or damage to collateral;

(d) a transfer of an unearned right to payment under a contract to a person who is to perform the transferor's obligations under the contract;

(e) the creation or transfer of an interest in land including a lease;

(f) a transfer of a right to payment that arises in connection with an interest in land, including a transfer of rental payments payable under a lease of land, but not including a right to payment evidenced by a security;

(g) a sale of accounts or chattel paper as part of a sale of a business out of which they arose unless the vendor remains in apparent control of the business after the sale;
(h) a transfer of accounts made solely to facilitate the collection of the accounts for the assignor;
(i) an assignment for the general benefit of creditors made pursuant to an Act of the Parliament of Canada relating to insolvency;
(j) a transfer of present or future wages, salary, pay, commission or any other compensation for labour or personal services;
(k) a transfer of a right to damages in tort.

Law applicable: general rules for goods and collateral in possession of secured party

5. (1) Subject to this Act, the validity, perfection and effect of perfection or non-perfection of

(a) a security interest in goods, or
(b) a possessory security interest in a security, an instrument, a negotiable document of title, money or chattel paper

is governed by the law of the jurisdiction where the collateral is situated when the security interest attaches.

(2) A security interest in goods perfected under the law of the jurisdiction in which the goods are situated at the time the security interest attaches but before the goods are brought into the Province continues perfected in the Province if it is perfected in the Province

(a) not later than 60 days after the goods are brought into the Province,
(b) not later than 15 days after the day the secured party has knowledge that the goods have been brought into the Province, or
(c) prior to the date that perfection ceases under the law of the jurisdiction in which the goods were situated when the security interest attached,

whichever is the earliest, but the security interest is subordinate to the interest of a buyer or lessee of the goods who acquires his interest without knowledge of the security interest and before it is perfected in the Province under section 24 or 25.

(3) A security interest that is not perfected as provided in subsection (2) may be otherwise perfected in the Province under this Act.

(4) Where a security interest mentioned in subsection (1) is not perfected under the law of the jurisdiction in which the collateral was situated when the security interest attached and before the collateral was brought into the Province, it may be perfected under this Act.

Law applicable: parties intend goods to be removed from jurisdiction

6. (1) Subject to section 7,

(a) if the parties to a security agreement that creates a security interest in goods in one jurisdiction understand at the time the security interest attaches that the goods will be kept in another jurisdiction, and

(b) if the goods are removed to the other jurisdiction, for purposes other than transportation through the other jurisdiction, not later than 30 days after the security interest attaches,

the validity, perfection and effect of perfection or non-perfection of the security interest shall be governed by the law of the other jurisdiction.

(2) Where the goods are removed to another jurisdiction, but are later brought into the Province, the security interest in the goods is deemed to be a security interest to which section 5 (2) applies if it was perfected under the law of the jurisdiction to which the goods were removed.

Law applicable: mobile goods, intangibles, etc.

7. (1) For the purposes of this section, a debtor is deemed to be located

(a) at the place of business, if any, of the debtor,

(b) at the chief executive office of the debtor, if the debtor has more than one place of business, and

(c) at the place of residence of the debtor, if the debtor has no place of business.

(2) The validity, perfection and effect of perfection or non-perfection of

(a) a security interest in

  (i) an intangible, or

  (ii) goods that are of a type that are normally used in more than one jurisdiction, if the goods are equipment or inventory leased or held for lease by the debtor to others, and

(b) a non-possessory security interest in a security, an instrument, a negotiable document of title, money or chattel paper

is governed by the law, including the conflict of laws rules, of the jurisdiction where the debtor is located when the security interest attaches.

(3) Where the debtor relocates to another jurisdiction or transfers an interest in the collateral to a person located in another jurisdiction, a security interest perfected in accordance with the law applicable as provided in subsection (2) continues perfected in the Province if it is perfected in the other jurisdiction

(a) not later than 60 days after the day the debtor relocates or transfers an interest in the collateral to a person located in the other jurisdiction,

(b) not later than 15 days after the day the secured party has knowledge that the debtor has relocated or has transferred an interest in the collateral to a person located in the other jurisdiction, or

(c) prior to the date that perfection ceases under the law of the first jurisdiction,

whichever is the earliest.

(4) If the law governing the perfection of a security interest mentioned in subsection (2) does not provide for public registration or recording of the security interest or a notice relating to it, and the collateral is not in the possession of the secured party, the security interest is subordinate to

(a) an interest in an account payable in the Province, or

(b) an interest in goods, a security, an instrument, a negotiable document of title, money or chattel paper acquired when the collateral was situated in the Province,

unless it is perfected under this Act before the interest arises.

(5) A security interest referred to in subsection (4) may be perfected under this Act.

(6) Notwithstanding section 6 and subsection (2) of this section, the validity, perfection and effect of perfection and non-perfection of a security interest that

- (a) is created by a debtor who, before extraction, has an interest in minerals or hydrocarbons, and
- (b) attaches in respect of the minerals or hydrocarbons on extraction, or attaches to an account resulting from the sale of them at the wellhead or minehead,

is governed by the law of the jurisdiction in which the wellhead or minehead is located.

Law applicable: substance and procedure

8. (1) Notwithstanding sections 5, 6 and 7,

- (a) procedural issues involved in the enforcement of the rights of a secured party against collateral other than intangibles are governed by the law of the jurisdiction in which the collateral is located at the time of the exercise of the rights,
- (b) procedural issues involved in the enforcement of the rights of a secured party against intangibles are governed by the law of the forum, and
- (c) substantive issues involved in the enforcement of the rights of a secured party against collateral are governed by the proper law of the contract between the secured party and the debtor.

(2) For the purposes of sections 5, 6 and 7, a security interest is perfected under the law of a jurisdiction when the secured party has complied with the law of the jurisdiction with respect to the creation and continuance of a security interest and the security interest has a status in relation to the interests of other secured parties, buyers, judgment creditors or a trustee in bankruptcy of the debtor, similar to that of an equivalent security interest created and perfected under this Act.

PART 2

VALIDITY OF SECURITY AGREEMENTS AND RIGHTS OF PARTIES

Effectiveness of a security agreement

9. Subject to this and any other Act, a security agreement is effective according to its terms.

Writing requirements for security agreements

10. (1) Subject to subsection (2), a security interest is unenforceable against a third party unless

- (a) the collateral is in the possession of the secured party, or
- (b) the debtor has signed a security agreement that contains
  - (i) a description of the collateral by item or kind,

(ii) a statement that a security interest is taken in all of the debtor's present and after-acquired personal property, or

(iii) a statement that a security interest is taken in all of the debtor's present and after-acquired property except specified items or kinds of personal property.

(2) For the purposes of subsection (1) (a) a secured party is deemed not to have taken possession of collateral that is in the apparent possession or control of the debtor or the debtor's agent.

(3) A description is inadequate for the purposes of subsection (1) (b) if it describes the collateral as consumer goods or equipment without further reference to the kind of collateral.

(4) A description of collateral as inventory is adequate for the purposes of subsection (1) (b) only while it is held by the debtor as inventory.

(5) A security interest in proceeds is not unenforceable against a third party by reason only that the security agreement does not contain a description of the proceeds.

Debtor to have copy of written security agreement

11. Where a security agreement is in writing, the secured party shall deliver a copy of the writing to the debtor within 10 days after it is executed, and, if the secured party fails to do so after a request by the debtor, a judge may, on application by the debtor, order the delivery of the copy to the debtor.

Attachment of security interests

12. (1) A security interest, including a security interest in the nature of a floating charge, attaches when

(a) value is given,

(b) the debtor has rights in the collateral, and

(c) except for the purpose of enforcing rights as between the parties to the security agreement, the security interest becomes enforceable within the meaning of section 10,

unless the parties intend it to attach at a later time, in which case it attaches in accordance with the intention of the parties.

(2) For the purposes of subsection (1) (b) a debtor has rights in goods leased to him or consigned to him when he obtains possession of them pursuant to the lease or consignment.

(3) For the purposes of subsection (1), a debtor has no rights in

(a) crops until they become growing crops,

(b) the young of animals until they are conceived,

(c) oil, gas or minerals until they are extracted, or

(d) trees until they are severed.

Security interests in after-acquired property

13. (1) Subject to subsection (2), where a security agreement provides for a security interest in after-acquired property, the security interest attaches in accordance with section 12 without specific appropriation by the debtor.

(2) A security interest does not attach under an after-acquired property clause in a security agreement

- (a) to crops that become growing crops more than one year after the security agreement is executed, except that a security interest in crops that is given in conjunction with a lease, purchase or mortgage of land may, if the parties agree, attach to crops to be grown on the land concerned during the term of the lease, purchase or mortgage, or
- (b) to consumer goods other than an accession, unless the security interest is a purchase money security interest or a security interest in collateral obtained by the debtor as replacement for collateral described in the security agreement.

Future advances

14. A security agreement may provide for future advances.

Application of sale of goods law

15. Where a seller has a purchase money security interest in goods, the law relating to contracts of sale governs the sale including a disclaimer, limitation or modification of the seller's performance obligations with respect to the goods.

Acceleration clauses

16. Where a security agreement provides that a secured party may accelerate payment or performance by the debtor when the secured party is or believes himself insecure or decides that the collateral is in jeopardy, the provision shall be construed to mean that the secured party has the right to do so only if the secured party, in good faith, believes and has commercially reasonable grounds to believe that the prospect of payment or performance is or is about to be impaired or that the collateral is or is about to be placed in jeopardy.

Rights and obligations of secured parties in possession of collateral

17. (1) A secured party shall use reasonable care in the custody and preservation of collateral in the possession of the secured party, and, unless otherwise agreed, in the case of an instrument, a security or chattel paper, reasonable care includes taking necessary steps to preserve rights against other persons.

(2) Unless otherwise agreed, where collateral is in the secured party's possession,

- (a) reasonable expenses, including the costs of insurance and payment of taxes or other charges incurred in obtaining and maintaining possession of the collateral, are chargeable to the debtor and secured by the collateral,
- (b) the risk of loss or damage to the collateral, except where caused by the negligence of the secured party, is on the debtor to the extent of any deficiency in insurance coverage,
- (c) the secured party may hold as additional security any increase or profits, except money, received from the collateral, and shall apply

any money so received, unless remitted to the debtor, immediately on its receipt in reduction of the obligation, and

(d) the secured party shall keep the collateral identifiable, but fungible collateral may be commingled.

(3) Subject to subsection (1), a secured party may use the collateral

(a) in the manner and to the extent provided in the security agreement,

(b) for the purposes of preserving the collateral or its value, or

(c) pursuant to an order of a court.

Acquisition of information from secured parties

18. (1) The debtor, a creditor, a sheriff, a person with an interest in personal property of the debtor, or an authorized representative of any of them, may, by a demand in writing containing an address for reply and delivered to the secured party at his address in a financing statement or security agreement containing a description of the personal property, or more recent address if known by the person making the demand, require the secured party to send or make available to the person making the demand or, if the demand is made by the debtor, to any person at an address specified by the debtor, one or more of the following:

(a) a copy of any security agreement providing for a security interest held by the secured party in the personal property of the debtor;

(b) a statement in writing of the amount of the indebtedness and of the terms of payment of the indebtedness, as of the date specified in the demand;

(c) a written approval or correction of an itemized list of personal property attached to the demand indicating which items are collateral as of the date specified in the demand;

(d) a written approval or correction of the amount of the indebtedness and of the terms of payment of the indebtedness, as of the date specified in the demand;

(e) sufficient information as to the location of the security agreement or a copy of it to enable a person entitled to receive a copy of the security agreement to inspect it.

(2) A person with an interest in personal property of the debtor is entitled to make a demand under subsection (1) only with respect to a security agreement providing for a security interest in the property.

(3) The secured party, on the reasonable demand of the person entitled to receive a copy of the security agreement under subsection (1), shall permit him or his authorized representative to inspect the security agreement or a copy of it during normal business hours at the location mentioned in subsection (1) (e).

(4) Where a demand is made in accordance with subsection (1) (c) and the secured party claims a security interest in all of the personal property of the debtor, in all the property of the debtor other than a specified kind or item of property or in all of a specified kind of property of the debtor, the secured party may indicate this in lieu of approving or correcting the itemized list of the property.

(5) The secured party shall reply to the demand made under subsection (1) or (3) not later than 10 days after the demand is made, and if, without reasonable excuse, the secured party fails to do so or in the case of a demand his reply is incomplete or incorrect, the person making the demand, in addition to any other

remedy provided by this Act, may apply to a court for an order requiring the secured party to comply with the demand.

(6) Where a person receiving a demand under subsection (1) or (3) no longer has an interest in the obligation or property of the debtor that is the subject of the demand, he shall, not later than 10 days after receiving the demand, disclose the name and address of his successor in interest and the latest successor in interest, if known to him, and if, without reasonable excuse, this is not done, the person making the demand, in addition to any other remedy provided in this Act, may apply to a court for an order requiring the person to whom the demand has been made to comply with this section.

(7) On application under subsection (5) or (6), the court may make an order requiring

- (a) the secured party in subsection (5) to comply with the demand mentioned in that subsection, or
- (b) the person receiving the demand in subsection (6) to disclose the information mentioned in that section,

and if the order is not complied with may order that the security interest of the secured party with respect to which the demand was made is unperfected or extinguished and that any related registration be discharged, and may make any other order it considers necessary to ensure compliance with the demand.

(8) On an application mentioned in subsection (7) or on an application of the secured party mentioned in subsection (5) or the person mentioned in subsection (6) as receiving the demand, the court, subject to section 69 (1), may exempt the secured party or person receiving the demand in whole or in part from complying with subsection (5) or (6), other than a demand made by the debtor, or may extend the time for compliance.

(9) A secured party who has replied to a demand mentioned in subsection (1) is estopped for the purposes of this Act, against the person making the demand and any other person who can reasonably be expected to rely on the reply, to the extent that the person making the demand or the other person, as the case may be, has relied on the reply, from denying

- (a) the accuracy of the information contained in the reply to the demand under subsection (1) (b), (c) or (d), and
- (b) that the copy of the security agreement that he provided in response to a demand under subsection (1) (a) is a true copy of the security agreement required to be provided under subsection (1) (a).

(10) A successor in interest mentioned in subsection (6) is estopped for the purposes of this Act, as against the person making the demand mentioned in subsection (1) and any other person who can reasonably be expected to rely on the reply to the demand, to the extent that the person making the demand or the other person, as the case may be, has relied on the reply, from denying

- (a) the accuracy of the information contained in the reply to the demand under subsection (1) (b), (c) or (d), and
- (b) that the copy of the security agreement that is provided in response to a demand under subsection (1) (a) is a true copy of the security agreement required to be provided under subsection (1) (a)

unless

- (c) the person who relied on the reply knows that the interest has been transferred to the successor in interest and knows his identity and address, or

(d) prior to the demand, a financing change statement has been registered as provided in section 45 disclosing the successor in interest as the secured party.

(11) The person to whom a demand is made under this section may require payment in advance of a fee in a prescribed amount for each demand, but the debtor is entitled to a reply without charge once every 6 months.

PART 3

PERFECTION AND PRIORITIES

When security interest is perfected

19. A security interest is perfected when

(a) it has attached, and

(b) all steps required for perfection under this Act have been completed

regardless of the order of occurrence.

Subordination of unperfected security interests

20. A security interest

(a) in collateral is subordinate to the interest of

- (i) a person who causes the collateral to be seized under legal process to enforce a judgment including execution, garnishment or attachment, or who has obtained a charging order or equitable execution affecting or relating to the collateral,
- (ii) a sheriff who has seized or obtained a right to the collateral under the *Creditor Assistance Act*, or persons entitled to participate in the distribution of money resulting from the disposition of the collateral by the sheriff, and
- (iii) a representative of creditors, but only for the purposes of enforcing the rights of a person mentioned in subparagraph (i)

if the security interest is unperfected at the time that any of the interests of persons mentioned in subparagraph (i), (ii) or (iii) arise,

(b) in collateral is not effective against a trustee in bankruptcy if the security interest is unperfected at the date of the bankruptcy, and

(c) in chattel paper, a document of title, a security, an instrument, an intangible or goods is subordinate to the interest of a transferee who

- (i) acquires an interest under a transaction that is not a security agreement,
- (ii) gives value, and
- (iii) acquires the interest without knowledge of the security interest and before the security interest is perfected.

Measure of damages suffered by lessor

21. Where the interest of a lessor under a lease for a term of more than one year or of a consignor under a commercial consignment is subordinated to a trustee in bankruptcy under section 20 (b), the lessor or consignor is deemed as against the lessee or consignee, as the case may be, to have suffered, immediately prior to the date of bankruptcy, damages in an amount equal to

(a) the value of the leased or consigned goods at the date of bankruptcy, and

(b) the amount of loss resulting from the termination of the lease or consignment.

Perfection of purchase money security interests

22. (1) A purchase money security interest in

(a) collateral, other than an intangible, that is perfected not later than 15 days after the date the debtor, or a third person at the request of the debtor, obtains possession of the collateral, whichever is earlier, or

(b) an intangible that is perfected not later than 15 days after the day the security interest attaches

has priority over the interests of persons mentioned in section 20 (a) and (b).

(2) For the purposes of this section, where goods are shipped by common carrier to a debtor or to a person designated by the debtor, the debtor does not have possession of the goods until the debtor or the third person at the request of the debtor has obtained actual possession of the goods or documents of title to the goods, whichever is earlier.

Continuity of perfection

23. (1) If a security interest is originally perfected under this Act and is again perfected in some other way without an intermediate period during which it is unperfected, the security interest is continuously perfected for the purposes of this Act.

(2) A transferee of a security interest has the same priority with respect to perfection of the security interest as the transferor had at the time of the transfer.

Perfection by possession of collateral

24. (1) Subject to section 19, possession of the collateral by the secured party, or on his behalf by another person, perfects a security interest in

(a) chattel paper,

(b) goods,

(c) an instrument,

(d) a security,

(e) a negotiable document of title, and

(f) money

but only while it is actually held as collateral.

(2) For the purposes of subsection (1), a secured party does not have possession of collateral that is in the actual or apparent possession or control of the debtor or the debtor's agent.

(3) Where the collateral is a security, the transfer of which may be effected by the making of the appropriate entries in the records of a clearing corporation as provided in the law applicable to the transfer of securities, a secured party is deemed to have taken possession of the security when the appropriate entries have been made so as to indicate a transfer of the security to the secured party.

Perfection by registration

25. Subject to section 19, registration of a financing statement perfects a security interest in collateral.

Temporary perfection

26. (1) A security interest perfected under section 24 in

- (a) an instrument or a security that a secured party delivers to the debtor for the purpose of
  - (i) ultimate sale or exchange,
  - (ii) presentation, collection or renewal, or
  - (iii) registration of transfer, or
- (b) a negotiable document of title or goods held by a bailee that are not covered by a negotiable document of title, which document of title or goods the secured party makes available to the debtor for the purpose of
  - (i) ultimate sale or exchange,
  - (ii) loading, unloading, storing, shipping or transshipping, or
  - (iii) manufacturing, processing, packaging or otherwise dealing with the goods in a manner preliminary to their sale or exchange

remains perfected for the first 15 days after the collateral comes under the control of the debtor.

(2) After the expiration of the period of time mentioned in subsection (1), a security interest mentioned in this section is subject to the provisions of the Act relating to the perfection of a security interest.

Perfection where goods in hands of bailees

27. (1) Subject to section 19, a security interest in goods in the hands of a bailee is perfected by

- (a) issue of a document of title by the bailee in the name of the secured party,
- (b) perfection of a security interest in a negotiable document of title to the goods where the bailee has issued one,
- (c) holding by the bailee on behalf of the secured party pursuant to section 24,
- (d) deposit, by a secured party to whom a non-negotiable receipt has been transferred, of the transfer with the warehouseman who issued the receipt, in accordance with section 21 (2) of the *Warehouse Receipt Act*, or
- (e) registration of a financing statement relating to the goods.

(2) The issue of a negotiable document of title covering goods does not preclude any other security interest in the goods arising during the period that the negotiable document of title is outstanding.

(3) A perfected security interest in a negotiable document of title covering goods takes priority over a security interest in goods otherwise perfected after the goods become covered by the negotiable document of title.

Security interests in proceeds

28. (1) Subject to this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest

(a) continues in the collateral unless the secured party expressly or impliedly authorizes the dealing, and

(b) extends to the proceeds,

but where the secured party enforces a security interest against both the collateral and the proceeds, the amount secured by the security interest in the collateral and the proceeds is limited to the market value of the collateral at the date of the dealing.

(2) A security interest in proceeds is a continuously perfected security interest if the interest in the original collateral is perfected

(a) by registration of a financing statement that contains a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind,

(b) by registering a financing statement that covers the original collateral, if the proceeds are of a kind that are within the description of the original collateral, or

(c) by registration of a financing statement that covers the original collateral, if the proceeds are cash proceeds.

(3) Where the security interest in the original collateral was perfected other than in a manner mentioned in subsection (2), the security interest in the proceeds is a continuously perfected security interest but becomes unperfected on the expiration of 15 days after the security interest in the original collateral attaches to the proceeds.

Security interests in returned or repossessed goods

29. (1) Where a debtor sells or leases goods that are subject to a security interest under circumstances in which the buyer or lessee takes free of the security interest under section 28 or 30, the security interest reattaches to the goods if

(a) the goods are returned, seized or repossessed, and

(b) the obligation secured remains unpaid or unperformed.

(2) Where a security interest reattaches under subsection (1), the perfection of the security interest and the time of registration or perfection is determined as if the goods had not been sold or leased if the security interest was perfected by registration at the time of the sale or lease and the registration is effective at the time of the return, seizure or repossession.

(3) Where a sale or lease of goods creates an account or chattel paper, and

(a) the account or chattel paper is transferred to a secured party, and

(b) the goods are returned, seized or repossessed,

the transferee of the account or chattel paper has a security interest in the goods that attaches when the goods are returned, seized or repossessed.

(4) A security interest arising under subsection (3) is perfected if the security interest in the account or chattel paper was perfected at the time of the return, seizure or repossession, but becomes unperfected on the expiry of 15 days thereafter unless the transferee registers a financing statement relating to the security interest or takes possession of the goods before the expiry of that period.

(5) A security interest in goods that a transferee of an account has under subsection (3) is subordinate to a perfected security interest arising under subsection (1) and to a security interest of a transferee of chattel paper arising under subsection (3).

(6) A security interest in goods that a transferee of chattel paper has under subsection (3), has priority over

- (a) a security interest in the goods arising under subsection (1), and
- (b) a security interest in the goods as after-acquired property that attaches on the return, seizure or repossession of the goods

if the transferee of the chattel paper would have priority under section 31 (5) as to the chattel paper over an interest in the chattel paper claimed by the holder of the security interest in the goods.

(7) A security interest in goods given by a buyer or lessee of the goods referred to in subsection (1) that attaches while the goods are in the possession of a buyer or lessee or the debtor and that is perfected when the goods are returned, seized or repossessed has priority over a security interest in the goods arising under this section.

Protection of buyer or lessee of goods

30. (1) For the purposes of this section,

"buyer of goods" includes a person who obtains vested rights in goods pursuant to a contract to which he is a party, as a consequence of the goods becoming a fixture or accession to property in which he has an interest;

"the ordinary course of business of the seller" includes the supply goods in the ordinary course of business as part of a contract of services and materials.

(2) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest in the goods given by the seller or lessor or arising under section 28 or 29, whether or not the buyer or lessee knows of it, unless the buyer or lessee also knows that the sale or lease constitutes a breach of the security agreement under which the security interest was created.

(3) A buyer or lessee of consumer goods takes free from a perfected or unperfected security interest in the goods if the buyer or lessee

- (a) gave new value for the interest acquired, and
- (b) bought or leased the goods without knowledge of the security interest.

(4) Subsection (3) does not apply to a security interest in

- (a) a fixture, or
- (b) goods the purchase price of which exceeds $1 000 or, in the case of a lease, the market value of which exceeds $1 000.

(5) A buyer or lessee of goods takes free from a security interest that is temporarily perfected under section 26 (1), 28 (3) or 29 (4) or a security interest the perfection of which is continued under section 51 during any of the 15 day periods mentioned in those sections, if the buyer or lessee

- (a) gave new value for the interest acquired, and
- (b) bought or leased the goods without knowledge of the security interest.

(6) Where goods are sold or leased other than in the ordinary course of business of the seller or lessor, the buyer or lessee takes free from any security interest in the goods perfected under section 25, if the buyer or lessee

(a) bought or leased the goods without knowledge of the security interest, and
(b) the goods were not described by serial number in the registration relating to the security interest.

(7) Subsection (6) applies only to goods that at the date of the sale or lease were held by the seller or lessor as equipment and that are of a kind that may be described in a registration by serial number.

(8) A sale or lease under subsection (2), (3), (5) or (6) may be for cash, by exchange for other property or on credit and includes delivering goods or documents of title to goods under a pre-existing contract for sale, but does not include a transfer as security for, or in total or partial satisfaction of, a money debt or past liability.

Protection of transferees of negotiable and quasi-negotiable collateral

31. (1) A holder of money has priority over a security interest perfected under section 25, or temporarily perfected under section 28 (3) if the holder
(a) acquired the money without knowledge that it was subject to a security interest, or
(b) is a holder for value, whether or not he acquired the money without knowledge that it was subject to a security interest.

(2) A creditor who receives an instrument drawn or made by a debtor and delivered in payment of a debt owing to the creditor by that debtor has priority over a security interest in the instrument whether or not the creditor has knowledge of the security interest at the time of delivery.

(3) A purchaser of an instrument or a security has priority over a security interest in the instrument or security perfected under section 25 or temporarily perfected under section 26 or 28 (3) if the purchaser
(a) gave value for the instrument or security,
(b) acquired the instrument or security without knowledge that it was subject to a security interest,
(c) subject to paragraph (d), took possession of the instrument or security, and
(d) where the security is an uncertificated security, has caused the appropriate entry to be made in the records of the appropriate clearing corporation indicating that the security has been transferred to him.

(4) A holder of a negotiable document of title has priority over a security interest in the document of title that is perfected under section 25 or temporarily perfected under section 26 or 28 (3), if the holder
(a) gave value for the document of title, and
(b) acquired the document of title without knowledge that it was subject to a security interest.

(5) A purchaser of chattel paper who takes possession of the chattel paper in the ordinary course of his business and for new value has priority over any security interest in it that
(a) was perfected under section 25, if the purchaser does not know at the time of taking possession that the chattel paper is subject to a security interest, or,

(b) has attached to proceeds of inventory under section 28, whatever the extent of the purchaser's knowledge.

Priority of liens

32. Where a person in the ordinary course of business furnishes materials or services with respect to goods that are subject to a security interest, any lien of his with respect to the materials or services has priority over a perfected security interest in the goods unless the lien is given by an Act that provides that the lien does not have the priority.

Transfer of debtors' rights in collateral

33. The rights of a debtor in collateral may be transferred consensually or by operation of law notwithstanding a provision in a security agreement prohibiting transfer or declaring a transfer to be a default, but a transfer by the debtor does not prejudice the rights of the secured party under the agreement or otherwise, including the right to treat a prohibited transfer as an act of default.

Purchase money security interests

34. (1) Subject to section 28, a purchase money security interest in

(a) collateral or its proceeds other than intangibles or inventory, that is perfected not later than 15 days after the day the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier, or

(b) an intangible or its proceeds that is perfected not later than 15 days after the day the security interest in the intangible attaches

has priority over any other security interest in the same collateral given by the same debtor.

(2) Subject to subsection (5) and section 28, a purchase money security interest in inventory or its proceeds has priority over any other security interest in the same collateral given by the same debtor if

(a) the purchase money security interest in the inventory is perfected at the time the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier,

(b) the secured party gives a notice to any other secured party who has registered a financing statement or security agreement containing a description that includes the same item or kind of collateral before the time of registration of the purchase money security interest,

(c) the notice referred to in paragraph (b) states that the person giving the notice expects to acquire a purchase money security interest in inventory of the debtor, and describes the inventory by item or kind, and

(d) the notice is given before the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier.

(3) A notice mentioned in subsection (2) may be given in accordance with section 72 or by registered mail addressed to the address of the person to be notified as it appears in the security agreement or financing statement mentioned in subsection (2) (b).

(4) Subject to section 28 a purchase money security interest in goods and its proceeds, taken by a seller, lessor or consignor of the collateral, that is perfected

(a) in the case of inventory, at the date the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier, and

(b) in the case of collateral other than inventory, not later than 15 days after the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier,

has priority over any other purchase money security interest in the same collateral given by the same debtor.

(5) A non-proceeds security interest in accounts given for new value has priority over a purchase money security interest in the accounts as proceeds of inventory if a financing statement relating to the security interest in the accounts is registered before the purchase money security interest is perfected or a financing statement relating to it is registered.

(6) A non-proceeds purchase money security interest has priority over a purchase money security interest in the same collateral as proceeds, if the non-proceeds purchase money security interest,

(a) in the case of inventory, is perfected at the date the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier, and

(b) in the case of collateral other than inventory, is perfected not later than 15 days after the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier.

(7) For the purposes of this section, where goods are shipped by common carrier to a debtor or to a person designated by a debtor, the debtor is deemed not to have obtained possession of the goods until the debtor, or another person at the request of the debtor, has obtained actual possession of the goods or a document of title to the goods, whichever is earlier.

(8) A perfected security interest in crops or their proceeds, given for value to enable a debtor to produce the crops and given during a period of 6 months immediately prior to the time the crops become growing crops, has priority over any other security interest in the crops given by the same debtor.

(9) A perfected security interest in fowl, cattle, horses, sheep, swine or fish given for value to enable the debtor to acquire food, drugs or hormones to be fed to or placed in the animals or fish has priority over any other security interest in the animals or fish other than a perfected purchase money security interest.

Residual priority rules

35. (1) Where this Act provides no other method for determining priority between security interests,

(a) priority between perfected security interests in the same collateral is determined by
   (i) the registration of a financing statement,
   (ii) possession of the collateral pursuant to section 24, or
   (iii) perfection under section 5, 7, 26, 29 or 77,
   whichever is the earliest,

(b) a perfected security interest has priority over an unperfected security interest, and

(c) priority between unperfected security interests is determined by the order of attachment of the security interests.

(2) For the purposes of subsection (1), a continuously perfected security interest shall be treated at all times as perfected by the method by which it was originally perfected.

(3) Subject to section 28, for the purposes of subsection (1), the time of registration, possession or perfection of a security interest in original collateral is also the time of registration, possession or perfection of its proceeds.

(4) A security interest in goods, held by the debtor as equipment and that may be described by serial number, is not registered or perfected by registration for the purposes of subsection (1), (7) or (8) unless a financing statement relating to the security interest and containing a description of the goods by serial number is registered.

(5) Subject to subsection (6), the priority that a security interest has under subsection (1) applies to all advances, including future advances.

(6) A perfected security interest has priority over the interests of persons mentioned in section 20 (a) or (b) only to the extent of

(a) advances made before the interests of the persons arise, or made before the sheriff seizes the collateral or obtains a right to it,

(b) advances made before the secured party acquires knowledge of the interests of the persons, of seizure of the collateral by the sheriff or of an order giving the sheriff right to the collateral,

(c) advances made pursuant to a legally binding commitment entered into by the secured party before acquiring the knowledge mentioned in paragraph (b), and

(d) reasonable costs incurred and expenditures made by the secured party for the protection, preservation or repair of the collateral.

(7) Where registration of a security interest lapses as a result of failure to renew the registration or where a registration has been discharged without authorization or in error, and the secured party re-registers the security interest not later than 30 days after the lapse or discharge, the lapse or discharge does not affect the priority status of the security interest in relation to a competing perfected security interest that immediately prior to the lapse or discharge had a subordinate priority position, except to the extent that the competing security interest secures advances made or contracted for after the lapse or discharge and prior to the re-registration.

(8) Where a debtor transfers an interest in collateral which, at the time of the transfer, is subject to a perfected security interest, that security interest has priority over any other security interest granted by the transferee before the transfer, except to the extent that the security interest granted by the transferee secures advances made or contracted for after the transfer and at a time when the security interest granted by the debtor is unperfected through the operation of section 51.

(9) Subsection (8) does not apply where the transferee acquires the debtor's interest free from the security interest granted by the debtor.

Security interests in fixtures

36. (1) Except as provided in this section and in section 30, a security interest in goods that attaches before or at the time the goods become fixtures has priority with respect to the goods over a claim to the goods made by a person with an interest in the land.

(2) A security interest mentioned in subsection (1) is subordinate to the interest of

- (a) a person who acquires for value a registered interest in the land after the goods become fixtures,
- (b) an assignee for value of the interest of a person with a registered interest in the land at the time the goods become fixtures, and
- (c) any person with a registered mortgage on the land who
  - (i) makes an advance under the mortgage, but only with respect to the advance, or
  - (ii) obtains an order for sale or foreclosure

without fraud and before the security interest is registered in accordance with section 49.

(3) A security interest in goods that attaches after the goods become fixtures is subordinated to the interest of a person who

- (a) has an interest in the land at the time the goods become fixtures and who
  - (i) has not consented to the security interest,
  - (ii) has not disclaimed an interest in the goods or fixtures,
  - (iii) has not entered into an agreement under which a person is entitled to remove the goods, or
  - (iv) is not otherwise precluded from preventing the debtor from removing the goods, or
- (b) acquires an interest in the land after the goods become fixtures, if the interest is acquired without fraud and before the security interest in the goods is registered in accordance with section 49.

(4) A security interest mentioned in subsection (1) or (3) is subordinate to the interest of a creditor of the debtor who caused to be registered pursuant to the *Court Order Enforcement Act*, a judgment in the appropriate land title office affecting the land before the security interest is registered in accordance with section 49.

(5) The interest of a creditor mentioned in subsection (4) does not take priority over a purchase money security interest in goods that is registered in accordance with section 49 not later than 15 days after the goods are affixed to the land.

(6) A secured party who, under this Act, has the right to remove goods from land shall exercise this right of removal in a manner that causes no greater damage or injury to the land and to other property situated on it or that puts the occupier of the land to no greater inconvenience than is necessarily incidental to the removal of the goods.

(7) A person, other than the debtor, who has an interest in the land at the time the goods subject to the security interest are affixed to the land is entitled to reimbursement for any damages to his interest in the land caused during the removal of the goods, but is not entitled to reimbursement for diminution in the value of the land caused by the absence of the goods removed or by the necessity of replacement.

(8) The person entitled to reimbursement as provided in subsection (7) may refuse permission to remove the goods until the secured party has given adequate security for reimbursement.

(9) The secured party may apply to a court for one or more of the following orders:

(a) determining the person entitled to reimbursement under this section;
(b) determining the amount and kind of security to be provided by the secured party;
(c) prescribing the depository for the security;
(d) dispensing with the consent of any or all persons mentioned in subsection (8).

(10) A person having an interest in the land that is subordinate to a security interest as provided in this section may, before the goods have been removed from the land by the secured party, retain the goods on payment to the secured party of the amount secured by the security interest having priority over his interest.

(11) The secured party who has a right to remove the goods from the land shall give to each person who appears by the records of the land title office to have an interest in the land, a notice of the intention of the secured party to remove the goods, and the notice shall contain

(a) the name and address of the secured party,
(b) a description of the goods to be removed,
(c) the amount required to satisfy the obligation secured by the security interest,
(d) a description of the land to which the goods are affixed, and
(e) a statement of intention to remove the goods unless the amount secured is paid on or before a specified date that is not less than 15 days after the notice is given in accordance with subsection (12).

(12) A notice mentioned in subsection (11) shall be given at least 15 days before removal of the goods, and may be given in accordance with section 72 or by registered mail addressed to the address of the person to be notified as it appears in the records of the land title office.

(13) A person entitled to receive a notice under subsection (12) may apply to a court for an order postponing removal of the goods from the land.

Security interests in crops

37. (1) Except as provided in this section, a security interest in crops has priority with respect to the crops over an interest in the crops claimed by a person with an interest in the land.

(2) A security interest mentioned in subsection (1) is subordinate to the interest of

(a) a person who acquires for value a registered interest in the land while the crops are growing crops,
(b) an assignee for value of the interest of a person with a registered interest in the land where the assignee acquires his interest for value and while the crops are growing crops, and
(c) a person with a registered mortgage on the land who
    (i) makes an advance under the mortgage, but only with respect to the advance, or
    (ii) obtains an order for sale or foreclosure

without fraud and before the security interest in the growing crops is registered in accordance with section 49.

(3) A security interest mentioned in subsection (1) is subordinate to the interest of a creditor of the debtor who causes to be registered pursuant to the

Court Order Enforcement Act a judgment in the appropriate land title office affecting the land on which the crops are growing before the security interest is registered in accordance with section 49.

(4) The interest of a creditor mentioned in subsection (3) does not take priority over a purchase money security interest in the crops, or a security interest in the crops mentioned in section 34 (8), that is registered in accordance with section 49 not later than 15 days after the time the security interest in the crops attaches.

(5) Section 36 (6) to (13) applies with all necessary modifications to seizure and removal of growing crops from land.

Security interests in accessions

38. (1) In this section

"other goods" means goods to which an accession is installed or affixed;

"the whole" means an accession and the goods to which the accession is installed or affixed.

(2) Except as provided in this section, a security interest in goods that attaches before or at the time the goods become an accession has priority with respect to the goods over a claim to the goods as an accession made by a person with an interest in the whole.

(3) A security interest mentioned in subsection (2) is subordinate to the interest of

- (a) a person who acquires for value an interest in the whole after the goods become an accession,
- (b) an assignee for value of the interest of a person with an interest in the whole at the time the goods become an accession, and
- (c) a person with a prior perfected security interest in the whole who
  - (i) makes an advance under a security agreement, but only with respect to the advance, or
  - (ii) acquires the right to retain the whole in satisfaction of the obligation secured

without knowledge of the security interest in the accession and before it is perfected.

(4) A security interest in goods that attaches after the goods become an accession is subordinate to the interest of a person who

- (a) has an interest in the other goods at the time the goods become an accession and who
  - (i) has not consented to the security interest,
  - (ii) has not disclaimed an interest in the accession,
  - (iii) has not entered into an agreement under which a person is entitled to remove the accession, or
  - (iv) is not otherwise precluded from preventing the debtor from removing the accession, or
- (b) acquires an interest in the whole after the goods become an accession, if the interest is acquired without knowledge and before the security interest in the accession is perfected.

(5) A security interest mentioned in subsections (2) and (4) is subordinate to the interest of a creditor or of a sheriff who has seized or caused the whole to be seized under legal process to enforce a judgment, if the seizure occurs under

circumstances referred to in section 20 and if the security interest is not perfected at the date of seizure.

(6) The interest of a creditor or of a sheriff mentioned in subsection (5) does not take priority over a purchase money security interest in goods that is perfected not later than 15 days after the goods become an accession.

(7) A secured party who, under this Act, has the right to remove an accession from the whole shall exercise this right of removal in a manner that causes no greater damage or injury to the other goods or that puts the person in possession of the whole to no greater inconvenience than is necessarily incidental to the removal of the accession.

(8) A person, other than the debtor, who has an interest in the other goods at the time the goods subject to the security interest become an accession is entitled to reimbursement for any damages to his interest in the other goods caused during the removal of the accession, but is not entitled to reimbursement for diminution in the value of the other goods caused by the absence of the accession or by the necessity of its replacement.

(9) The person entitled to reimbursement as provided in subsection (8) may refuse permission to remove the accession until the secured party has given adequate security for reimbursement.

(10) The secured party may apply to a court for one or more of the following orders:

(a) determining the person entitled to reimbursement under this section;
(b) determining the amount and kind of security to be provided by the secured party;
(c) prescribing the depository for the security;
(d) dispensing with the consent of any or all persons mentioned in subsection (9).

(11) A person having an interest in the whole that is subordinate to a security interest as provided in this section may, before the accession has been removed from the whole by the secured party, retain the accession on payment to the secured party of the amount secured by the security interest having priority over his interest.

(12) The secured party who has a right to remove the accession from the whole shall give to each person

(a) who is known by the secured party to have an interest in the other goods or in the whole, and
(b) to each person who has registered a financing statement indexed in the name of the debtor and referring to the other goods or according to the serial number of the other goods where the serial number is required or permitted for registration,

a notice of the intention of the secured party to remove the accession, and the notice shall contain

(c) the name and address of the secured party,
(d) a description of the goods to be removed,
(e) the amount required to satisfy the obligation secured by the security interest,
(f) a description of the other goods, and
(g) a statement of intention to remove the accession unless the amount secured is paid on or before a specified date that is not less than 15 days after the notice is given in accordance with subsection (13).

(13) A notice mentioned in subsection (12) shall be given at least 15 days before removal of the accession, and may be given in accordance with section 72 or by registered mail addressed to the address of the person to be notified as it appears on the security agreement or financing statement.

(14) A person entitled to receive a notice under subsection (12) may apply to a court for an order postponing removal of the accession.

Security interests in processed or commingled goods

39. (1) A perfected security interest in goods that subsequently become part of a product or mass continues in the product or mass if the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product.

(2) Subject to subsection (3), where more than one perfected security interest continues in the same product or mass under subsection (1), and each was a security interest in separate goods, the security interests are entitled to share in the product or mass according to the ratio that the obligation secured by each security interest bears to the sum of the obligations secured by all security interests.

(3) A perfected purchase money security interest in goods that continues in the product or mass under subsection (1) has priority over

- (a) a non-purchase money security interest in the goods that continues in the product or mass under subsection (1),
- (b) a non-purchase money security interest in the product or mass, other than as inventory, given by the same debtor, and
- (c) a non-purchase money security interest in the product or mass as inventory given by the same debtor if
  - (i) the secured party with the purchase money security interest in the product or mass gives a notice to any secured party with the non-purchase money security interest in the product or mass, who registers a financing statement containing a description of collateral that includes the product or mass, before the identity of the goods is lost in the product or mass,
  - (ii) the notice contains a statement that the person giving the notice has acquired or expects to acquire a purchase money security interest in goods supplied to the debtor as inventory, and
  - (iii) the notice is given before the identity of the goods is lost in the product or mass.

(4) A notice mentioned in subsection (3) (c) may be given in accordance with section 72 or by registered mail addressed to the address of the person to be notified as it appears in the financing statement mentioned in subsection (3) (c).

(5) This section does not apply to a security interest in an accession to which section 38 applies.

Subordination of security interests

40. A secured party may, in a security agreement or otherwise, subordinate his security interest to any other interest, and the subordination is effective according to its terms between the parties and may be enforced by a third party if the third party is the person or one of a class of person for whose benefit the agreement was intended.

Assignments of intangibles or chattel paper

41. (1) In this section "account debtor" means a person who is obligated under an intangible or chattel paper.

(2) The rights of an assignee of collateral which is either an intangible or chattel paper are subject to

- (a) the terms of the contract between the account debtor and the assignor and any defence or claim arising from it, and
- (b) any other defence or claim of the account debtor against the assignor that accrues before the account debtor receives notice of the assignment,

unless the account debtor has made an enforceable agreement not to assert defences or claims arising out of the contract.

(3) To the extent that an assigned right to payment arising out of the contract has not been earned by performance, and notwithstanding notice of the assignment to the account debtor, any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards and without material adverse effect on the assignee's rights under the contract or the assignor's ability to perform the contract, is effective against the assignee unless the account debtor has otherwise agreed, but the assignee acquires corresponding rights under the modified or substituted contract.

(4) Nothing in subsection (3) affects the validity of a term in an assignment agreement that provides that a modification or substitution mentioned in that subsection is a breach of contract by the assignor.

(5) Where collateral which is either an intangible or chattel paper is assigned, the account debtor may make payments under the contract to the assignor

- (a) before the account debtor receives a notice that
  - (i) states that the amount payable or to become payable under the contract has been assigned and payment is to be made to the assignee, and
  - (ii) that identifies the contract under which the amount payable is to become payable, or
- (b) after
  - (i) the account debtor requests the assignee to furnish proof of the assignment, and
  - (ii) the assignee fails to furnish the proof within 15 days from the date of the request.

(6) A term in a contract between an account debtor and an assignor that prohibits or restricts assignment of the whole of the account or chattel paper for money due or to become due is binding on the assignor, but only to the extent of making the assignor liable in damages for breach of contract, and is unenforceable against third parties.

PART 4

REGISTRATION

Personal Property Registry

42. (1) There shall be a registry known as the Personal Property Registry for the purposes of registrations under this Act and for registrations that are permitted or required to be registered under any other Act to be made in the registry.

(2) The registrar may have a seal of office in the form prescribed.

(3) The minister may designate a person as registrar.

(4) The registrar may designate one or more persons as deputy registrars.

(5) The registrar shall direct and supervise the operation of the registry under the direction of the minister.

(6) Notwithstanding any regulation made under section 78, when in the opinion of the registrar, the circumstances are such that operation of the registry is not practicable, the registrar may

(a) refuse to register financing statements,
(b) refuse to accept requests for search results, and
(c) otherwise suspend one or more of the functions of the registry

for the period of time during which, in his opinion, the circumstances prevail.

Registration of financing statements

43. (1) A financing statement may be submitted for registration at an office of the registry.

(2) Registration of a financing statement is effective from the date assigned to it in the office of the registry, and, where 2 or more financing statements are assigned the same date, the order of registration is determined by reference to the registration numbers placed on the financing statements in the registry office.

(3) The registrar shall not register a financing statement or issue a search result under this Part until any prescribed fees have been paid or arrangements for their payment have been made.

(4) Subject to this Act, a financing statement may be registered before a security agreement is made and before a security interest attaches.

(5) A registration may relate to one or more than one security agreement.

(6) The validity of the registration of a financing statement or a notice is not affected by a defect, irregularity, omission or error in the financing statement or notice or in the execution or registration of it unless the defect, irregularity, omission or error is seriously misleading.

(7) Where collateral is of a kind that is required to be described in a financing statement by serial number and there is a seriously misleading defect, irregularity, omission or error in

(a) the debtor's name, or
(b) the serial number of the collateral,

the registration is invalid.

(8) Nothing in subsections (6) and (7) shall require as a condition to a finding that a defect, irregularity, omission or error is misleading, proof that anyone was actually misled by it.

(9) Failure to provide a description in a financing statement or a notice in relation to any item or kind of collateral does not affect the validity or effectiveness of the registration with respect to other collateral.

(10) Failure to indicate the prior registration law on a financing change statement providing for the continuation of a registration under prior law as provided in section 77 is not seriously misleading for the purposes of subsection (6).

(11) A person who fails to indicate in the prescribed manner the appropriate prior registration law on a financing change statement providing for the continuation of a registration under prior law fails to discharge an obligation within the meaning of section 69 to any person who has suffered damages as a result of reliance on the financing change statement.

(12) Notwithstanding anything in this Part, the registrar may reject a financing statement when, in the opinion of the registrar, it does not comply with this Act or the regulations or any other Act under which registration of a financing statement is authorized, and shall give the reason for the rejection.

(13) The secured party or person named as secured party in a financing statement shall give to each person named as debtor in the statement, not later than 15 days after it is submitted for registration, a copy of the statement unless a person entitled to a copy has waived in writing his right to receive it.

Duration of and amendments to registrations

44. (1) Except as otherwise prescribed, a registration under this Act is effective for the period of time indicated on the financing statement by which the registration is effected or amended.

(2) A registration may be renewed by registering a financing change statement at any time before the registration expires, and, except as otherwise prescribed, the renewed registration is effective from the registration date of the renewal to the expiry of the period indicated on the financing change statement.

(3) An amendment to a registration may be made by registering a financing change statement at any time during the period that the registration is effective, and the amendment is effective from the date the financing change statement is registered to the expiry of the registration being amended.

(4) When an amendment of a registration is not otherwise provided for in this Part, a financing change statement may be registered to amend the registration.

Registration of transfers of security interests

45. (1) Where a secured party with a registered security interest transfers the interest or a part of it, the transfer may be registered by submitting a financing change statement.

(2) If an interest in part of the collateral is transferred, the financing change statement shall indicate the transfer and shall contain a description of the collateral.

(3) When a secured party transfers an interest in collateral and the security interest of the secured party is not perfected by registration, a financing

statement may be registered in which the transferee is disclosed as the secured party.

(4) A financing change statement disclosing a transfer of a security interest may be registered before or after the transfer.

(5) After registration of a financing change statement disclosing a transfer of a security interest, the transferee is the secured party for the purposes of this Part.

(6) When a secured party has subordinated his interest to the interest of another person, a financing change statement may be registered to disclose the subordination at any time during the period that the registration of the subordinated interest is effective.

Registration documents

46. (1) Where a financing statement is registered in the registry, the registrar may have the statement photographed or otherwise reproduced, and the reproduction is for all purposes deemed to be the statement photographed or reproduced.

(2) Information in a registration may be removed from the records of the registry

(a) when the registration is no longer effective,
(b) on the receipt of a financing change statement discharging or partially discharging the registration,
(c) if the secured party fails to submit to the registrar a court order maintaining the registration under section 50, or
(d) on receipt of an order of a court compelling the discharge or partial discharge of a registration.

Registration not constructive notice

47. For the purposes of this Act, registration of a financing statement in the registry is not constructive notice or knowledge of its existence or contents to third parties.

Registry searches

48. (1) A person may, in the manner prescribed, request one or more of the following:

(a) a search against the name of a debtor and the issue of the search result;
(b) a search according to the serial number of goods of a kind that may or are required to be described by serial number on a financing statement and the issue of the search result;
(c) a search according to a registration number and the issue of a search result;
(d) a certified copy of any registered document.

(2) A printed search result that purports to be issued by the registry is receivable in evidence as prima facie proof of its contents.

(3) The date of registration of a financing statement as shown on a search result issued under this section is prima facie proof of the date of registration of

the financing statement, and the registration number as shown on the search result is prima facie proof of the order of registration of the financing statement.

(4) A copy of a registered financing statement or other registered document bearing the certification of the registrar is receivable in evidence as a true copy of the statement or document without proof of the signature or official position of the registrar.

Registration in land title office

49. (1) For the purposes of this section

"secured party" includes any person identified on a notice as a secured party;

"debtor" includes any person identified on a notice as a debtor.

(2) A security interest in a fixture under section 36, and a security interest in a growing crop under section 37 may be registered by tendering a prescribed notice to the land title office for the land title district where the land is located to which the fixture or growing crop, as the case may be, has been or is to be attached or grown.

(3) The registrar of the land title office to which the notice in subsection (2) is tendered shall make a memorandum of the notice on the certificate of title or the condominium plan, as the case may be, in respect of the parcel of land to which the notice relates.

(4) If a notice has been registered in a land title office under subsection (2) and the registration of the notice has not expired, a notice of a renewal, amendment, transfer or discharge of the security interest to which the original notice relates, or a notice of a subordination of the security interest to another interest, may be registered in the land title office, and, on its being so registered, the registrar of the land title office shall make a memorandum of it on the proper certificate of title or condominium plan, as the case may be.

(5) Sections 43 to 45 apply, with all necessary modifications, to a notice registered under this section.

(6) If a notice registered under this section expires, the registrar of the land title office in which it has been registered may vacate the registered notice and any other notice that relates to the same security interest and may strike a memorandum of the notice made on a certificate of title or condominium plan.

(7) A notice registered under this section may be discharged by registering a discharge.

(8) Where a notice is registered under this section and

(a) all of the obligations under the security agreement to which the notice relates have been performed,

(b) the secured party has agreed to release part or all of the collateral described in the notice,

(c) the description of the collateral contained in the notice includes an item or kind of property that is not collateral under a security agreement between the secured party and the debtor, or

(d) no security agreement exists between the secured party and the debtor,

the debtor named in the notice or any person having a registered interest in the land may give a written demand to the secured party.

(9) The demand under subsection (8) may require that,

(a) in a case falling within subsection (8) (a) or (d), the registration of the notice be discharged,
(b) in a case falling within subsection (8) (b), the registration be amended or discharged, as the case may be, to reflect the terms of the agreement, or
(c) in a case falling within subsection (8) (c), the collateral description on the notice be amended to exclude items or kinds of property that are not collateral under a security agreement between the secured party and the debtor,

and the secured party shall amend or discharge the registration of the notice accordingly not later than 15 days after the demand is given.

(10) If the secured party fails to amend or discharge the notice as required in subsection (9), the person who has made the demand may require the registrar of the land title office in which the registration has been made pursuant to this section, to give notice in writing to the secured party stating that the registration will be discharged or amended, as the case may be, by the registrar in accordance with the demand, on the expiry of 40 days after the day the registrar gives the notice to the secured party, unless in the meantime the secured party tenders to the registrar a court order maintaining the registration.

(11) The demand mentioned in subsection (8) and the notice mentioned in subsection (10) may be given in accordance with section 72 or by registered mail addressed to the address of the secured party as it appears on the notice registered under this section.

(12) Section 50 (7) to (10) applies with all necessary modifications to a notice registered under this section.

(13) No fee or expense shall be charged and no amount shall be accepted by a secured party for compliance with a demand made under subsection (8).

Amendment or discharge of registrations

50. (1) For the purposes of this section,

"secured party" includes any person identified on a registered financing statement as a secured party;

"debtor" includes any person identified on a registered financing statement as a debtor.

(2) Where a registration relates exclusively to a security interest in consumer goods, the secured party shall discharge the registration not later than one month after all obligations under the security agreement creating the security interest are performed, unless prior to the expiry of that one month period the registration lapses.

(3) Where a financing statement is registered and
(a) all of the obligations under the security agreement to which it relates have been performed,
(b) the secured party has agreed to release part or all of the collateral described in the financing statement,
(c) the description of the collateral contained in the financing statement includes an item or kind of property that is not collateral under a security agreement between the secured party and the debtor, or
(d) no security agreement exists between the secured party and the debtor,

the debtor or any person with an interest in property that falls within the collateral description on the financing statement may give a written demand to the secured party.

(4) The demand under subsection (3) may require that,

(a) in a case falling within subsection (3) (a) or (d), the registration be discharged,

(b) in a case falling within subsection (3) (b), the registration be amended or discharged, as the case may be, to reflect the terms of the agreement, or

(c) in a case falling within subsection (3) (c), the collateral description be amended to exclude items or kinds of property that are not collateral under a security agreement between the secured party and the debtor,

and the secured party shall amend or discharge the registration not later than 15 days after the demand is given.

(5) If the secured party fails to amend or discharge the registration as required in subsection (4), the person who has made the demand may require the registrar to give a notice in writing to the secured party stating that the registration will be discharged or amended, as the case may be, by the registrar in accordance with the demand, on the expiry of 40 days after the day the registrar gives the notice to the secured party, unless in the meantime the secured party registers an order of a court maintaining the registration.

(6) The demand mentioned in subsection (3) and the notice mentioned in subsection (5) may be given in accordance with section 72 or by registered mail addressed to the address of the secured party as it appears on the security agreement or financing statement.

(7) If the secured party who has been given a notice mentioned in subsection (5) fails to

(a) register a financing change statement amending or discharging the registration as required in the demand made under subsection (3), or

(b) obtain a court order as provided in subsection (8)

before the expiry of 40 days after the notice has been given to him, the registrar may amend or discharge the registration to which the demand made under subsection (3) relates in accordance with the demand.

(8) On application to a court by the secured party, the court may order that the registration

(a) be maintained on any conditions and, subject to section 44 (1), for any period of time, or

(b) be discharged or amended.

(9) Subsections (5) and (7) do not apply to a registration of a security interest provided for in a trust indenture if the financing statement through which the security interest was registered indicates that the security agreement providing for the security interest is a trust indenture.

(10) Where a registration relates to a security interest created under a trust indenture and the secured party fails to amend or discharge the registration as required by subsection (4), the person making the demand under subsection (3) may apply to a court for an order directing that the registration be amended or discharged.

(11) No fee or expense shall be charged and no amount shall be accepted by a secured party for compliance with a demand made under subsection (3).

Transfer of debtors' interests in collateral or change of debtors' names

51. (1) Where a security interest has been perfected by registration and the debtor transfers all or part of the interest in the collateral with the prior consent of the secured party, the security interest is subordinate to

- (a) an interest, other than a security interest in the transferred collateral, arising in the period from the expiry of the 15th day after the transfer to, but not including, the day the secured party amends the registration to name the transferee of the collateral as the new debtor or takes possession of the collateral,
- (b) a perfected security interest in the collateral registered or perfected in the period mentioned in paragraph (a), and
- (c) a perfected security interest in the collateral registered or perfected after the transfer and before the expiry of the 15th day after the transfer if the registration of the security interest first mentioned in this subsection is not amended before the expiry of the 15 days.

(2) Where a security interest is perfected by registration and the secured party has knowledge of

- (a) information required to register a financing change statement showing the transferee as the new debtor, where the debtor has transferred all or part of the debtor's interest in the collateral, or
- (b) the new name of the debtor, where there has been a change in the debtor's name,

the security interest in the collateral transferred, where paragraph (a) applies, and in the collateral where paragraph (b) applies, is subordinate to

- (c) an interest, other than a security interest, in the transferred collateral, arising in the period from the expiry of the 15th day after the secured party has knowledge of information mentioned in paragraph (a) or the new name of the debtor, as the case may be, to, but not including, the day the secured party amends the registration to name the transferee of the collateral as the new debtor, or to indicate the new name of the debtor, as the case may be, or takes possession of the collateral,
- (d) a perfected security interest in the collateral registered or perfected in the period referred to in paragraph (c), or
- (e) a perfected security interest in the collateral registered or perfected after the secured party has knowledge of the information mentioned in paragraph (a) or of the new name of the debtor, as the case may be, and before the expiry of the 15th day referred to in paragraph (c), if the registration of the security interest first mentioned in this subsection is not amended before the expiry of the 15 days.

(3) This section does not have the effect of subordinating a prior security interest under prior registration law deemed under section 77 to be registered under this Act.

(4) Where the debtor's interest in part or all of the collateral is transferred by the debtor without the consent of the secured party and there are one or more subsequent transfers of the collateral without the consent of the secured party before the secured party learns the name of the transferee who has possession of the collateral, the secured party shall be deemed to have complied with subsection (2) if the secured party registers a financing change statement not later than 15

days after learning the name of the transferee who has possession of the collateral and the information required to register a financing change statement, and the secured party need not register financing change statements with respect to any intermediate transferee.

Recovery of loss caused by error in registry

52. (1) A person who suffers loss or damage as a result of his reliance on a printed search result that is incorrect because of an error or omission in the operation of the registry may bring action against the registrar to recover the loss or damage.

(2) No action for damage under this section or section 53 lies against the registrar unless it is commenced not later than one year after the person entitled to bring the action became aware of the loss or damage, or 6 years from the date the search result was issued, whichever is earlier.

(3) No action under this section may be brought by a person who relied on a search result unless that person or an agent of that person requested the search result.

(4) Notwithstanding the *Crown Proceeding Act*, no action may be brought against the Crown in right of the Province, the registrar or an officer or employee of the registry for any error or omission of the registrar or an officer or employee of the registry in respect of the discharge or purported discharge of any duty or function under this Act, the regulations or under any other Act except as provided in this section and in section 53.

Recovery of loss where trust deeds involved

53. (1) An action for recovery of damages under section 52 brought by a trustee under a trust indenture or by a person with an interest in a trust indenture shall be brought on behalf of all persons with interests in the same trust indenture, and the judgment in the action, except to the extent that it provides for subsequent determination of the amount of damages suffered by each person, constitutes a judgment between each person and the registrar in respect of each error or omission.

(2) In an action brought by a trustee under a trust indenture or by a person with an interest in a trust indenture, proof that each person relied on the search result is not necessary if it is established that the trustee relied on the search result, but no person is entitled to recover damages under this section if he knows at the time he loans money to the debtor that the search result relied on by the trustee is incorrect.

(3) In proceedings under this section, a court may make any order that it considers appropriate in order to give notice to the persons with interests in the same trust indenture.

(4) Subject to section 54, a court may order payment of all or a portion of the damages awarded to identified persons with interests in the same trust indenture at any time after judgment, and the obligation of the registrar to satisfy the judgment is satisfied to the extent that payment is made.

Payment of claim for loss

54. (1) The total amount recoverable in a single action under section 52 shall not exceed a prescribed amount, and the total amount recoverable for all claims in a single action under section 53 shall not exceed a prescribed amount.

(2) Where damages are paid to a claimant pursuant to section 52 or 53, the Crown is subrogated to the rights of the claimant against any person indebted to the claimant whose debt to the claimant was the basis of the loss or damage in respect of which the claim was paid.

(3) Where the claimant recovers pursuant to section 52 or 53 an amount less than the value of the interest the claimant would have had if the error or omission had not occurred, the right of subrogation under subsection (2) does not prejudice the ability of the claimant to recover in priority to the Crown an amount equal to the difference between the amount paid to the claimant and the value of the interest the claimant would have had if the error or omission had not occurred.

PART 5

RIGHTS AND REMEDIES ON DEFAULT

Default rights and remedies: general provisions

55. (1) Unless otherwise provided in this Part, this Part applies only to a security interest that secures payment or performance of an obligation.

(2) Except as provided in sections 58 (2) and 67 the rights and remedies mentioned in this Part are cumulative.

(3) This Part does not apply to a transaction between a pledgor and a pawnbroker.

(4) In this Part, "receiver" includes receiver-manager except where the context indicates otherwise.

(5) The rights and remedies provided in a security agreement, in this Part and in section 17, shall be exercised in good faith and in a commercially reasonable manner.

(6) Subject to any other Act or rule to the contrary, where the same obligation is secured by an interest in land and a security interest to which this Act applies, the secured party may

(a) proceed under this Part as to the personal property, or

(b) proceed as to both the land and personal property as if the personal property were land in which case the secured party's rights, remedies and duties in respect of the land apply with necessary modifications as if the personal property were land, and this Part does not apply.

(7) Except as provided in section 67 a security interest does not merge merely because a secured party has reduced his claim to judgment.

Limitations on waiver of rights

56. (1) Where the debtor is in default under a security agreement

(a) except as provided by subsection (2), the secured party has against the debtor the rights and remedies provided in the security agreement, the rights, remedies and obligations provided in this Part and in sections 36, 37 and 38 and, when in possession, the rights, remedies and obligations provided in section 17, and

(b) the debtor has against the secured party the rights and remedies provided in the security agreement, the rights and remedies provided by any other statute or rule of law not inconsistent with this Act, and the rights and remedies provided in this Part and in section 17.

(2) Except as provided in subsection (3) and sections 17 (2) and 59, no provision of sections 17 or 58 to 69, to the extent that it gives rights to the debtor or imposes obligations on the secured party, can be waived or varied by agreement or otherwise.

(3) A spouse as defined in the *Family Relations Act* may, with respect to a security agreement entered into by the spouse pursuant to an order under section 52 (2) (f) of the *Family Relations Act* or a written separation agreement, in writing waive or release a right, benefit or protection given by section 67 (1) and (2) of this Act, but the waiver or release is void where the person relying on it is other than the spouse to whom it was given.

Collection of payments under intangibles or chattel paper

57. (1) Where so agreed and in any event on default under a security agreement, a secured party is entitled

(a) to notify a debtor on an intangible or chattel paper or an obligor on an instrument to make payment to the secured party whether or not the assignor was making collections on the collateral before the notification, and

(b) to take control of proceeds to which he is entitled under section 28.

(2) A secured party who by agreement is entitled to charge back uncollected collateral or otherwise entitled to full or limited recourse against the debtor and who undertakes to collect from debtors on intangibles or chattel paper or from obligors on instruments, may deduct his reasonable expenses of realization from the collections.

Right of seizure or repossession

58. (1) Subject to subsection (2) and to sections 36, 37 and 38, on default under a security agreement

(a) the secured party has, unless otherwise agreed, the right to seize or repossess the collateral by any method permitted by law,

(b) where the collateral is goods of a kind that cannot be readily moved from the debtor's premises or of a kind for which adequate alternative storage facilities are not readily available, the secured party may seize or repossess the collateral without removing it from the debtor's premises in any manner by which a sheriff may seize without removal, if the secured party's interest is perfected by registration,

(c) where paragraph (b) applies, the secured party may dispose of the collateral on the debtor's premises, but shall not cause the person in possession of the premises any greater inconvenience and cost than is necessarily incidental to the disposal, and

(d) if the collateral is a document of title, the secured party may proceed either as to the document of title or as to the goods covered by it, and any method of enforcement that is available with respect to the document of title is also available, with all necessary modifications, with respect to the goods covered by it.

(2) Subject to subsection (3), where a debtor, who is in default under a security agreement that provides for a security interest in goods which at the time of execution of the agreement are being acquired or held as consumer goods by the debtor, has paid at least 2/3 of the total amount of the obligation secured, the secured party shall not seize the goods.

(3) On application by the secured party, a court may order that subsection (2) does not apply, and the order may be subject to conditions.

(4) In an application under subsection (3) the court may take into consideration all relevant circumstances, including the value of the collateral, the amount of the obligation that has been discharged, the reasons for default and the present and future financial circumstances of the parties.

Regulation of disposition of collateral

59. (1) After seizing or repossessing the collateral, a secured party may dispose of it in its condition either before or after repair, processing or preparation for disposition, and the proceeds of the disposition shall be applied consecutively to

- (a) the reasonable expenses of seizing, repossessing, holding, repairing, processing or preparing for disposition and disposing of the collateral and any other reasonable expenses incurred by the secured party, and
- (b) the satisfaction of the obligations secured by the security interest of the party making the disposition,

and any surplus shall be dealt with in accordance with section 60.

(2) Collateral may be disposed of

- (a) by private sale,
- (b) by public sale, including public auction or closed tender with sale to the highest bidder or tenderer,
- (c) as a whole or in commercial units or parts, or
- (d) if the security agreement so provides, by lease or by deferred payment.

(3) The secured party may delay disposition of the collateral in whole or in part.

(4) Not less than 20 days prior to the disposition of the collateral, the secured party shall give notice of disposition to

- (a) the debtor or any other person who is known by the secured party to be an owner of the collateral,
- (b) any creditor or person with a security interest in the collateral whose interest is subordinate to that of the secured party
  - (i) who has registered a financing statement using the name of the debtor or according to the serial number of the collateral when it is required or permitted for registration, or
  - (ii) whose security interest is perfected by possession at the time the secured party seized or repossessed the collateral, and
- (c) any other person with an interest in the collateral who has given notice to the secured party of his interest in the collateral prior to the day that notice of disposition is given to the debtor.

(5) The notice of disposition mentioned in subsection (4) shall contain

- (a) a description of the collateral,

(b) the amount required to satisfy the obligation secured by the security interest,
(c) the sum actually in arrears, exclusive of the operation of an acceleration clause in the security agreement, and a brief description of any other provision of the security agreement for the breach of which the secured party intends to dispose of the collateral,
(d) the amount of the applicable expenses mentioned in subsection (1) (a) or, where the amount of the expenses has not been determined, a reasonable estimate,
(e) a statement that on payment of the amounts due under paragraphs (b) and (d), any person entitled to receive the notice may redeem the collateral,
(f) a statement that on payment of the sum in arrears or the curing of any other default, as the case may be, together with the amounts due under subsection (1) (a), the debtor may reinstate the security agreement,
(g) a statement that, unless the collateral is redeemed or the security agreement is reinstated, it will be disposed of and the debtor may be liable for a deficiency, and
(h) the date, time and place of any sale by public auction, or the place to which closed tenders may be delivered and the date after which closed tenders will not be accepted or after which any private disposition of the collateral is to be made.

(6) Where the notice required by subsection (4) is given to a person other than the debtor, it need not contain the information specified in subsection (5) (c), (f), and (g).

(7) A statement mentioned in subsection (5) (g) shall not contain reference to any liability on the part of the debtor to pay a deficiency if under this or any other Act or rule of law the secured party does not have the right to collect the deficiency from the debtor.

(8) Not less than 20 days prior to the disposition of the collateral, a receiver shall give a notice to

(a) the debtor, and where the debtor is a corporation, a director of the corporation,
(b) any other person who is known by the secured party to be an owner of the collateral,
(c) a person mentioned in subsection (4) (b), and
(d) any other person with an interest in the collateral who has given a notice to the receiver of his interest in the collateral prior to its disposition.

(9) The notice mentioned in subsection (8) shall contain

(a) a description of the collateral,
(b) a statement that unless the collateral is redeemed it will be disposed of, and
(c) the date, time and place of any sale by public auction, or the place to which closed tenders may be delivered and the date after which closed tenders will not be accepted or after which any private disposition of the collateral is to be made.

(10) The notice required by subsection (4) or (8) may be given in accordance with section 72 or, where it is to be given to a person who has registered a

financing statement, by registered mail addressed to the address of the person to whom it is to be given as it appears on the security agreement or financing statement.

(11) The secured party may purchase the collateral or any part of it at a public sale as mentioned in subsection (2) (b) but only for a price that bears a reasonable relationship to the market value of the collateral.

(12) When a secured party disposes of collateral to a purchaser who acquires his interest for value and in good faith and who takes possession of it, the purchaser acquires the collateral free from

- (a) the interest of the debtor,
- (b) an interest subordinate to that of the debtor, and
- (c) an interest subordinate to that of the secured party

whether or not the requirements of this section have been complied with by the secured party, and all obligations secured by the subordinate interests are deemed performed for the purposes of sections 49 and 50.

(13) Subsection (12) does not apply so as to affect the rights of a person with a security interest deemed to be registered under section 77 who has not been given a notice under this section.

(14) A person who is liable to a secured party under a guarantee, endorsement, covenant, repurchase agreement or the like and who receives a transfer of collateral from the secured party or who is subrogated to the rights of the secured party has the rights and duties of the secured party, and the transfer of collateral is not a disposition of the collateral.

(15) The notice mentioned in subsection (4) or (8) is not required where

- (a) the collateral is perishable,
- (b) the secured party believes on reasonable grounds that the collateral will decline substantially in value if not disposed of immediately after default,
- (c) the cost of care and storage of the collateral is disproportionately large relative to its value,
- (d) for any other reason, a court on an ex parte application is satisfied that a notice is not required, or
- (e) after default, each person entitled to receive a notice of disposition consents in writing to the immediate disposition of the collateral.

Distribution of amounts realized from disposition of collateral

60. (1) Where a security agreement secures an indebtedness and the secured party has dealt with the collateral under section 57, or has disposed of it in accordance with section 59 or otherwise, any surplus shall, unless otherwise provided by law or by the agreement of all interested parties, be accounted for and paid in the following order to

- (a) a person who has a subordinate security interest in the collateral
  - (i) who registers a financing statement, using the name of the debtor or according to the serial number of the collateral when it may or is required to be registered, prior to the distribution of the surplus, or
  - (ii) whose interest was perfected by possession at the time the collateral was seized,

(b) any other person with an interest in the surplus, if that person has given a notice of his interest to the secured party prior to the distribution, and
(c) the debtor or any other person who is known by the secured party to be an owner of the collateral,

but the priority of the claim of a person referred to in paragraph (a), (b) or (c) against the recipient of the surplus is not prejudiced by payment to anyone pursuant to this section.

(2) The secured party shall give a written accounting of
(a) the amount received from the disposition of collateral,
(b) the manner in which the collateral was sold,
(c) the amount of expenses as provided in sections 17 and 59, and
(d) the distribution of the amount received from the disposition

to a person mentioned in subsection (1) within 30 days after receipt of a written demand for an accounting.

(3) Where there is a question as to who is entitled to receive payment under subsection (1), the secured party may pay the surplus into court and the surplus shall not be paid out except on an application under section 70 by a person claiming an entitlement to it.

(4) Unless otherwise agreed, or unless otherwise provided in this or any other Act, the debtor is liable to pay the deficiency to the secured party.

Voluntary foreclosure

61. (1) After default, a secured party may propose to take the collateral in satisfaction of the obligation secured by it, and shall give a notice of the proposal to
(a) the debtor or any other person who is known by the secured party to be an owner of the collateral,
(b) a creditor or person with a security interest in the collateral whose interest is subordinate to that of the secured party
  (i) who has registered a financing statement using the name of the debtor or according to the serial number of the collateral when it is required or permitted for registration, or
  (ii) whose security interest is perfected by possession at the time the secured party seized or repossessed the collateral, and
(c) another person with an interest in the collateral who has given a notice to the secured party of an interest in the collateral prior to the date that the notice is given to the debtor.

(2) If any person, who is entitled to a notice under subsection (1) and whose interest in the collateral would be adversely affected by the secured party's proposal, gives to the secured party a notice of objection within 15 days after the notice under subsection (1) is given, the secured party shall dispose of the collateral under section 59.

(3) If no notice of objection is made, the secured party is, at the expiry of the 15 day period or periods mentioned in subsection (2), deemed to have irrevocably elected to retain the collateral in satisfaction of the obligation secured by it, and is entitled to hold or dispose of the collateral free from all rights and interest of the debtor and any person entitled to receive a notice
(a) under subsection (1) (b), and

(b) under subsection (1) (c) whose interest is subordinate to that of the secured party,

who has been given the notice.

(4) The notice required by subsection (1) may be given in accordance with section 72 or, if it is to be given to a person who has registered a financing statement, by registered mail addressed to the address of the person to whom it is to be given as it appears on the security agreement or financing statement.

(5) The secured party may request that a person mentioned in subsection (1), other than the debtor, furnish him with proof of that person's interest, and, unless the person furnishes the proof not later than 10 days after the secured party's request, the secured party may proceed as if no objection had been received from the person.

(6) On application by a secured party, the court may determine that an objection to the proposal of a secured party is ineffective on the ground that

(a) the person made the objection for a purpose other than the protection of an interest in the collateral or proceeds of a disposition of the collateral, or

(b) the market value of the collateral is less than the total amount owing to the secured party and the costs of disposition.

(7) Where a secured party disposes of the collateral to a purchaser who acquires his interest for value and in good faith and who takes possession of it, the purchaser acquires the collateral free from

(a) the interest of the debtor,

(b) an interest subordinate to that of the debtor, and

(c) an interest subordinate to that of the secured party

whether or not the requirements of this section have been complied with by the secured party, and all obligations secured by the subordinate interests are deemed performed for the purposes of sections 49 and 50.

(8) Subsection (7) does not apply so as to affect the rights of a person with a security interest deemed to be registered under section 77 who has not received a notice under this section.

Rights of redemption and reinstatement

62. (1) At any time before the secured party has disposed of the collateral or contracted for its disposition under section 59, or before the secured party is deemed to have irrevocably elected to retain the collateral under section 61,

(a) a person entitled to receive a notice of disposition under section 59 (4) or (8) may, unless the person has otherwise agreed in writing after default, redeem the collateral by tendering fulfillment of the obligations secured by the collateral, or

(b) the debtor may, unless the debtor has otherwise agreed in writing after default, reinstate the security agreement by paying the sums actually in arrears exclusive of the operation of an acceleration clause in the security agreement and by curing any other default by reason of which the secured party intends to dispose of the collateral,

together with a sum equal to the reasonable expenses incurred by the secured party in seizing, repossessing, holding, repairing, processing, or otherwise preparing the collateral for disposition.

(2) Unless otherwise agreed, the debtor is not entitled to reinstate a security agreement

(a) more than twice, if the security agreement provides for payment in full by the debtor within 12 months after the day value was given by the secured party, or

(b) more than twice each year, if the security agreement provides for payment by the debtor during a period of time in excess of one year after the day value was given by the secured party.

Supervisory jurisdiction of court

63. (1) Subject to subsection (2), on application of a debtor, a creditor of a debtor, a secured party, a sheriff or a person with an interest in the collateral, a court may make one or more of the following orders:

(a) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure compliance with this Part or section 17, 36, 37 or 38;

(b) give directions to a person with respect to the exercise of his rights or the discharge of his obligations under this Part or section 17, 36, 37 or 38;

(c) relieve a person from compliance with the requirements of this Part or section 17, 36, 37 or 38, but only on terms that are just and reasonable to all parties affected;

(d) stay enforcement of rights provided in this Part or section 17, 36, 37 or 38;

(e) make any order necessary to ensure protection of the collateral.

(2) Nothing in subsection (1) (c) and (d) affects the application of sections 58 (2) to (4) and 67.

Appointment and qualifications of receivers

64. (1) Subject to any other Act, a security agreement may provide for the appointment of a receiver and, except as provided in this Act, prescribe the rights and duties of the receiver, provided that only a person who is licensed as a trustee under the *Bankruptcy Act* (Canada) may be appointed pursuant to a security agreement as a receiver-manager.

(2) No person is qualified to act as a receiver appointed pursuant to a security agreement or an order of a court who is

(a) under the age of 18 years,

(b) found to be incapable of managing his own affairs by reason of mental infirmity,

(c) a corporation, except a trust company registered under the *Trust Company Act* or a corporation licensed as a trustee under the *Bankruptcy Act* (Canada),

(d) an undischarged bankrupt,

(e) an insider, as defined in the *Company Act*, of an incorporated debtor or of any of its affiliates, as defined in the *Company Act*, an auditor of the debtor or a person who has been an insider or auditor of the debtor or an affiliate of an incorporated debtor within the preceding 2 years,

(f) unless a court orders otherwise, a trustee under a trust indenture to which the debtor is a party,

(g) unless a court orders otherwise, a person convicted in the Province or elsewhere of an offence in connection with the promotion, formation or management of a business or involving fraud, unless 5 years have elapsed since the expiration of the period fixed for suspension of the passing of sentence without sentencing or since a fine was imposed, or the term of imprisonment or probation imposed, if any, was concluded, whichever is the latest, but the disability imposed by this paragraph ceases on a pardon being granted under the *Criminal Records Act* (Canada), or

(h) a person who does not reside in the Province, unless appointed by a court.

(3) Every person who

(a) appoints a person to act as a receiver, or

(b) acts as a receiver or receiver-manager

when the person acting as a receiver or receiver-manager is not qualified to do so under subsection (1) or (2) commits an offence and is liable in damages as provided in section 69.

(4) Unless otherwise ordered by a court, the acts of a person appointed as a receiver pursuant to a security agreement shall be valid notwithstanding that the person is not qualified to act as a receiver.

Reporting and disclosure obligations of receivers

65. (1) A receiver shall,

(a) not later than 14 days after being appointed receiver, publish a notice of the appointment in one issue of a local newspaper circulating in the district where the debtor's principal place of business in the Province is located,

(b) take into custody or control the collateral in accordance with the security agreement or order providing for the appointment of the receiver but, unless appointed a receiver-manager or unless a court orders otherwise, shall not carry on the business of the debtor for more than 14 days after the appointment,

(c) open and maintain in his name as receiver one or more accounts at a bank, credit union or other institution licensed to accept deposits in the Province, for the deposit of all money coming under his control as the receiver,

(d) keep records, in accordance with accepted accounting practices, of all receipts, expenditures and transactions involving collateral or other property of the debtor,

(e) prepare monthly summaries of accounts of the administration of the collateral or other property of the debtor, and

(f) indicate on every business letter, invoice, contract or similar document used or executed in connection with the receivership that he is acting as a receiver.

(2) The debtor, a sheriff, a secured party with a security interest in the collateral in the custody or control of a receiver, or any other person with an interest in the collateral, or their authorized representative, may, by a demand in writing delivered to a receiver, require the receiver to provide copies of the summaries of accounts prepared in accordance with subsection (1) (e) or make

available the summaries for inspection during regular business hours at the place of business of the receiver in the Province.

(3) The receiver shall comply with the demand mentioned in subsection (2) not later than 10 days from the date of receipt of the demand.

(4) The receiver may require payment in advance of a prescribed fee for each demand, but the sheriff and the debtor or, in the case of an incorporated debtor, a director of the debtor, are entitled to inspect or to receive a copy of each summary without charge.

Court supervision of receiverships

66. (1) On application by an interested person, a court may do one or more of the following:

- (a) appoint a receiver;
- (b) remove, replace or discharge a receiver, whether appointed by a court or pursuant to a security agreement;
- (c) give directions on any matter relating to the duties of a receiver;
- (d) approve the accounts and fix the remuneration of a receiver;
- (e) notwithstanding anything contained in a security agreement or other document providing for the appointment of a receiver, make an order requiring a receiver or a person by or on behalf of whom the receiver is appointed, to make good any default in connection with the receiver's custody, management or disposition of collateral or of other property of the debtor or failure to comply with this Part;
- (f) exercise with respect to receivers appointed pursuant to a security agreement the jurisdiction that it has over receivers appointed by the court.

(2) Unless a court orders otherwise, a receiver is required to comply with sections 59 and 60 only when the receiver deals with collateral other than in the ordinary course of operating the business of a debtor.

(3) The powers referred to in subsection (1) and in section 63 are in addition to any other powers a court may exercise in its jurisdiction over receivers.

Rights and remedies: consumer goods

67. (1) Subject to section 58 (2), where a debtor is in default under a security agreement that provides for a security interest in goods which at the time of execution of the agreement are being acquired or held as consumer goods by the debtor, the secured party may

- (a) exercise his rights as provided in section 58,
- (b) proceed as provided in section 61,
- (c) accept surrender of the goods by the debtor, or
- (d) subject to the terms of the agreement, bring action to recover a judgment or take proceedings to obtain a certificate under the *Creditor Assistance Act* against the debtor.

(2) Where the secured party proceeds under subsection (1) (a), (b) or (c), the debtor's unperformed obligations under the security agreement or a related agreement, other than a mortgage on land executed before July 1, 1973, and the obligations of a guarantor of or indemnitor with respect to such obligations are extinguished.

(3) Where the secured party exercises his rights under an agreement for sale or mortgage on land that also secures the obligation secured by a security interest in consumer goods but does not exercise his rights under subsection (1) (a), (b) or (c), the obligation is not thereby extinguished unless otherwise provided by the law relating to enforcement of security interests in land.

(4) Where a secured party who has a purchase money security interest in the goods mentioned in subsection (1) proceeds under paragraph (a), (b) or (c) with respect to some but not all of the goods, subsection (2) applies to that portion of the total obligation of the debt specifically identified in the security agreement as relating to the goods seized, repossessed or surrendered.

(5) Where a secured party proceeds under subsection (1) (d) and, as a result of legal proceedings taken to enforce a judgment against the debtor or proceedings to enforce a lien against the goods mentioned in subsection (1), the goods are seized and sold and the secured party receives money or other value as a result of the proceedings, the right of the secured party to recover under his judgment against the debtor or against a guarantor of or indemnitor with respect to the debtor's obligations under the security agreement is limited to the gross amount realized from the sale of the goods mentioned in subsection (1) under the proceedings.

(6) When the total amount received by the secured party as a result of legal proceedings to enforce a judgment against the debtor or proceedings to enforce a lien against the goods mentioned in subsection (1) is equal to the gross amount realized from the sale of such goods under the proceedings,

(a) any remaining liability of the debtor under a judgment obtained by the secured party through an exercise of his rights under subsection (1) (d), and

(b) the obligations of a guarantor of or indemnitor with respect to the obligations of the debtor under the security agreement

are discharged.

(7) Where a secured party proceeds under subsection (1) (a) or (d) and it is discovered after seizure or repossession that an accession which was collateral under the security agreement has been removed and not replaced by other goods of equivalent value and free from any prior security interest, nothing in subsection (2), (4) or (5) bars the secured party from proceeding to recover or to enforce a judgment against the debtor or a guarantor of or indemnitor with respect to the obligations of the debtor under the security agreement to the extent of the value of the accession.

(8) If through willful or reckless acts or neglect on the part of the debtor or on the part of anyone in possession of the goods with the consent of the debtor, the goods have been substantially damaged or have been allowed to deteriorate to an extent greater than that which would normally be expected with respect to goods of that kind, a court, on application, may order that subsections (1) to (6) or any one or more of them do not apply so as to limit the rights and remedies of the secured party as otherwise provided in this Part.

(9) Where a security agreement provides for a security interest in collateral, other than goods mentioned in subsection (1), to secure an obligation and the secured party takes as additional security a guarantee of performance of the obligation or an indemnity with respect to it from a person other than a corporation,

(a) seizure or repossession of the collateral pursuant to section 58,

(b) acceptance of surrender of the collateral by the debtor, or

(c) taking possession of the collateral pursuant to section 61,

does not extinguish the obligations of the guarantor or indemnitor.

(10) When the secured party exercises his rights under subsection (1) (d),

(a) the security interest in the goods mentioned in subsection (1) is extinguished, and

(b) the secured party shall discharge any registration relating to the security interest not later than one month thereafter.

PART 6

MISCELLANEOUS

Supplementary law

68. The principles of the common law, equity and the law merchant, except insofar as they are inconsistent with the provisions of this Act, supplement this Act and continue to apply.

Consequences of non-compliance with Act

69. (1) If a person fails to discharge any duties or obligations imposed on him by this Act, the person to whom the duty or obligation is owed has a right to recover loss or damage that was reasonably foreseeable as liable to result from the failure.

(2) Where a secured party, without reasonable excuse, fails to comply with obligations or limitations

(a) in section 43 (13), 49, 50, 58 or 67, or

(b) in section 17, 18, 59, 60 or 61, and the collateral is consumer goods,

the debtor or, in a case of non-compliance with section 49 or 50, the person named as debtor in a registration, shall be deemed to have suffered damages not less than the prescribed amount.

(3) In an action for a deficiency, the defendant may raise as a defence the failure on the part of the secured party to comply with obligations in section 17, 18, 59 or 60, but non-compliance shall limit the right to the deficiency only to the extent that it has affected the right of the defendant to protect his interest in the collateral or has made the accurate determination of the deficiency impracticable.

(4) Where a secured party fails to comply with obligations in section 17, 18, 59 or 60, the onus is on the secured party to show that the failure,

(a) where the collateral is consumer goods, did not affect the debtor's ability to protect his interest in the collateral by redemption or reinstatement of the security agreement, or otherwise, or

(b) did not make the accurate determination of the deficiency impracticable.

(5) Except as otherwise provided in this Act, a provision in a security agreement or any other agreement that purports to exclude a duty or onus imposed by this Act, or that purports to limit the liability of or the amount of damages recoverable from a person who has failed to discharge a duty or obligation imposed on him by this Act is void.

Summary proceedings

70. On application of an interested person, a court may

- (a) make an order determining questions of priority or entitlement to collateral, or
- (b) direct an action to be brought or an issue to be tried.

Extension of time for compliance

71. Where in sections 11, 36, 38 (13) and 43 (13) of this Act a time is prescribed not later than or before which an act or thing must be done, a court, on application made before or after the time has expired, may extend or abridge, conditionally or otherwise, the time for compliance.

Service of notices and demands

72. (1) A notice or demand under this Act means a notice or demand given to

- (a) an individual by leaving it with the individual or by registered mail addressed by indicating the individual's name and residence, or the name and place of any business of the person,
- (b) a partnership
  - (i) by leaving it with
    - (A) one or more of the general partners, or
    - (B) a person having at the time the notice is given control or management of the partnership business, or
  - (ii) by registered mail addressed to
    - (A) the partnership,
    - (B) any one or more of the general partners, or
    - (C) any person having at the time the notice is given control or management of the partnership business

  at the address of a partnership business,
- (c) a corporation, other than a municipality,
  - (i) by leaving it with an officer or director of the corporation or person in charge of any office or place of business of the corporation,
  - (ii) by leaving it with or by registered mail addressed to the registered or head office of the corporation, and
  - (iii) where the corporation has its registered or head office outside the Province, by leaving it with, or by registered mail addressed to, the attorney for the corporation,
- (d) a municipal corporation by leaving it with, or by registered mail addressed to, the principal office of the corporation or to the chief administrative officer of the corporation,
- (e) an association
  - (i) by leaving it with an officer of the association, or
  - (ii) by registered mail addressed to an officer of the association at the address of the officer, and
- (f) Her Majesty the Queen in right of British Columbia as provided in the *Crown Proceeding Act*.

(2) A notice or demand by registered mail is deemed to be given when the addressee actually receives the notice or demand or on the expiry of 4 days after the date of registration, whichever is the earlier.

Conflicts with legislation in general

73. Except as otherwise provided in this Act or any other Act, if there is a conflict between a provision of this Act and a provision of any other Act other than a provision mentioned in section 74, the provision of this Act prevails.

Conflicts with consumer protection legislation

74. If there is a conflict between a provision of this Act and the *Consumer Protection Act*, the *Trade Practice Act* or a provision for the protection of consumers in any other Act, the provision of that Act prevails.

References to other Acts

75. (1) A reference in an Act, regulation or writing to the *Book Accounts Assignment Act*, the *Chattel Mortgage Act*, the *Company Act*, the *Mobile Home Act* or the *Sale of Goods on Condition Act* that relates to a security interest is deemed to be a reference to this Act, or to the corresponding provisions of this Act.

(2) A reference in an Act, regulation, agreement or document to a chattel mortgage, conditional sales contract, floating charge, pledge, assignment of book accounts or other similar agreement is deemed to be a reference to the corresponding kind of security agreement under this Act.

Transition: applicable law

76. (1) In this section and section 77

"prior law" means the law in force immediately before the coming into force of this Act;

"prior security interest" means an interest created, reserved or provided for by a valid security agreement or other transaction made before this Act comes into force, that is a security interest within the meaning of this Act and to which this Act would have applied if it had been in force at the time the security agreement or other transaction was entered into.

(2) Subject to subsection (3), this Act applies

- (a) to every security agreement made after this Act comes into force, including an agreement that renews, extends or consolidates an agreement made before this Act comes into force,
- (b) to every security agreement made before this Act comes into force that has not been validly terminated in accordance with prior law before this Act comes into force, and
- (c) subject to subsections (4) and (5), to every prior security interest that is not enforced or otherwise validly terminated in accordance with prior law before this Act comes into force.

(3) Sections 23, 24 (3) and (4), 25 (2), 26, 27 and 28 of the *Chattel Mortgage Act*, and sections 19, 20 (3) and (4), 22, 23 and 24 of the *Sale of Goods on Condition Act* apply to chattel mortgages and conditional sale contracts, respectively, executed before this Act comes into force, and sections 58 (2) to (4) and 67 do not apply to such transactions.

(4) The validity of a prior security interest is governed by prior law.

(5) The order of priorities

- (a) between security interests is determined by prior law, if all of the competing security interests arose under security agreements entered into before this Act comes into force, and
- (b) between a security interest and the interest of a third party is determined by prior law, if the third party interest arose before this Act comes into force and the security interest arose under a security agreement entered into before this Act comes into force.

Transition: registrations

77. (1) In this section, "prior registration law" means the *Book Accounts Assignment Act*, the *Chattel Mortgage Act*, the *Company Act*, the *Mobile Home Act* and the *Sale of Goods on Condition Act* as they existed immediately before the coming into force of this Act.

(2) Except as otherwise provided in this section, a prior security interest that, when this Act comes into force, is covered by an unexpired filing or registration under prior registration law is deemed to have been registered and perfected under this Act, and, subject to this Act, the registered and perfected status of the interest continues for the unexpired portion of the filing or registration, as the case may be, and may be further continued by registration under this Act if the security interest could have been perfected by registration if it had attached after this Act comes into force.

(3) A registration of a prior security interest in

- (a) the office of the Registrar of Companies as provided by
  - (i) the *Company Act*,
  - (ii) section 4 (2) of the *Sale of Goods on Condition Act*, to the extent that the security interest is not taken in a motor vehicle as defined in the *Sale of Goods on Condition Act*,
  - (iii) section 7 of the *Chattel Mortgage Act*, to the extent that the security interest is not taken in a motor vehicle as defined in the *Chattel Mortgage Act*,
  - (iv) section 5 of the *Book Accounts Assignment Act*, to the extent it applies to a registration of an assignment made by a corporation, and
  - (v) section 136 of the *Railway Act*,
- (b) the office of the Registrar General pursuant to section 75 (4) of the *Company Act*, or
- (c) the office of the Provincial Secretary as provided in section 31 of the *Sale of Goods on Condition Act*

is deemed to have been registered and perfected under this Act, and the perfected status of the interest expires 5 years from the date this section comes into force, but may be further continued under this Act by registration under this Act if the security interest could have been perfected by registration if it had attached after this Act comes into force.

(4) A registration of a prior security interest

- (a) in the form of a chattel mortgage referred to in section 10 of the *Chattel Mortgage Act*, granted to the Farm Credit Corporation, or
- (b) subject to subsection (5), in a mobile home as provided in the *Mobile Home Act*,

is deemed to have been registered and perfected under this Act, and the perfected status of the interest expires 3 years from the date this section comes into force, but may be further continued under this Act by registration under this Act if the security interest could have been perfected by registration if it had attached after this Act comes into force.

(5) A prior security interest in the form of

(a) a floating charge, whether or not crystallized, or

(b) a mortgage given by a corporation

under which a mobile home as defined in the *Mobile Home Act* is collateral is deemed to have been registered and perfected under this Act and the perfected status of the interest expires 5 years from the date this section comes into force, but may be further continued under this Act if the security interest could have been perfected by registration if it had attached after this Act comes into force.

(6) A prior security interest that under prior law had the status of a perfected security interest without filing or registration and without the secured party taking possession of the collateral is perfected under this Act as of the date the security interest was created, and that perfection continues for 3 years from the date this Act comes into force, after which it becomes unperfected unless, being a security interest that could have been perfected under this Act if it had arisen after this Act comes into force, it is otherwise perfected under this Act.

(7) A prior security interest that, when this Act comes into force, could have been, but was not

(a) filed or registered under prior registration law, or

(b) perfected under prior law through possession of the collateral by the secured party

may, if it is a security interest that could have been perfected by registration or possession under this Act if it had arisen after this Act comes into force, may be perfected by registration or possession in accordance with this Act.

(8) A prior security interest that under this Act may be perfected by the secured party taking possession of the collateral is perfected for the purposes of this Act when possession of the collateral is taken in accordance with section 24 whether the possession was taken before or after this Act comes into force and notwithstanding that under prior law the security interest could not be perfected by taking possession of the collateral.

(9) A prior security interest that, when this Act came into force, was covered by an unexpired filing or registration under prior registration law, which is perfected under this Act without registration or the secured party taking possession of the collateral, remains perfected under this Act.

(10) A prior security interest that, when this Act came into force, could have been, but was not, covered by a filing or registration under prior registration law and that, under this Act, may be perfected without registration of the secured party taking possession of the collateral, is perfected under this Act if all of the conditions for perfection of a security interest are met.

Regulations

78. The Lieutenant Governor in Council may make regulations

(a) respecting the kinds of goods the leases of which are not within the scope of this Act,

(b) respecting the location and hours for the offices of the registrar or any of them,

(c) respecting the registry, including the transition from a prior registry system to the system established by this Act,

(d) respecting fees including different fees for different periods of registration,

(e) respecting the registration of financing statements,

(f) respecting
  (i) the form, content and manner of use of financing statements,
  (ii) the form, content and manner of use of notices and certificates mentioned in this Act, including notices and discharges referred to in section 49, and
  (iii) the manner in which collateral, including proceeds collateral, is described in financing statements and prescribing what kinds of goods may be or shall be described in part by serial number,

and may make different regulations for different classes of persons,

(g) respecting searches of the registry and the method of disclosure of registered information, including the form of a search result

(h) requiring or permitting the use of statements to confirm the registration of information on financing statements and financing change statements,

(i) respecting the registrar's power to amend a registration that contains an error caused by the act of the registrar or registry employees,

(j) respecting abbreviations, expansions or symbols that may be used in a financing statement or other form, notice or document used in connection with the registration of security interests or the disclosure of information in the registry,

(k) defining a word or expression used in this Act, and

(l) respecting any matter required or authorized by this Act to be prescribed.

DRAFT PERSONAL PROPERTY SECURITY ACT
CONSEQUENTIAL LEGISLATION

Adoption of the Personal Property Security Act will necessitate the following consequential legislation:

- Repeal of:
  - Sale of Goods on Condition Act, RSBC 1979, c. 373,
  - Chattel Mortgage Act, RSBC 1979, c. 48; and
  - Book Accounts Assignment Act, RSBC 1979, c. 32.

- Amendment of:
  - Company Act, RSBC 1979, c. 59,
  - Mobile Home Act, RSBC 1979, c. 281,
  - Repairers Lien Act, RSBC 1979, c. 363,
  - Woodworker Lien Act, RSBC 1979, c.436,
  - Tug Boat Worker Lien Act, RSBC 1979, c. 417,
  - Warehouse Receipt Act, RSBC 1979, c. 427,
  - Sale of Goods Act, RSBC 1979, c. 370,
  - Forest Act, RSBC 1979, c. 140,
  - Railway Act, RSBC 1979, c. 354,
  - various taxation statutes; and
  - various private incorporation bills.

Draft
Personal Property Security Act

Commentary

Province of British Columbia
Ministry of Finance and Corporate Relations

88-03862/

DRAFT PERSONAL PROPERTY SECURITY ACT
COMMENTARY

Part 1. Interpretation and Application

Section 1 - Interpretation

"accession"	This definition relates principally to section 38. Note that the meaning given to the term in this Act is broader than the common law meaning of the term. Under this definition, all that is required is that one item of goods be installed in or affixed to another item of goods. The extent to which it is attached and the difficulty and effect of its removal are not relevant.
"account"	An account is a species of the genus "intangible" defined elsewhere in this section . The now obsolete term "book debts" and "book accounts" have been displaced since in many cases debts are no longer recorded in books but are recorded on computer tapes or discs, and since the business community now uses the term "accounts receivable" when referring to monetary obligations arising out of the sale of goods or services. In order to fall within the definition, a right need not be current debt; and in order to be transferred an account need not be earned.
"building"	This definition relates exclusively to the definition "building materials".
"building materials"	This definition relates exclusively to the definition of "fixture" set out elsewhere in this section, which in turn relates to section 36. Section 36 provides for the taking and perfection of security interests in goods attached to real property. However, for the purposes of the system established under section 36, anything falling within the definition of "building materials" is not a fixture and therefore not within the scope of the section. Essentially, "building materials" are defined so as to include most things that are commonly referred to as building materials. Excluded from the definition are heating, air conditioning and conveyancing devices and other machinery that are often the subject-matter of personal property security interests.

"chattel paper"

This section defines a type of collateral not recognized in this form as a separate type of collateral under existing British Columbia law. Special rules dealing with transfers of interests in chattel paper are set out elsewhere in the Act. See especially, sections 29 and 31(5).

"commercial consignment"

The purpose of this definition is to identify what types of non-security consignments are brought within the conflicts, perfection and priority provisions of the Act under section 3(b). It is clear that not all consignments are included. Only those involving consignors and consignees who are in the business of dealing in goods of the kind consigned fall within the definition. Of these, consignments involving consignees who are generally known by their creditors to be acting as consignees are excluded.

Non-commercial consignments such as consignments of consumer goods by consumers to a consignment business for resale are not within the Act.

"consumer goods"

The Act places all goods into one of three categories: consumer goods, inventory or equipment. This system of classification is an important aspect of the conflict of laws, perfection and priority features of the Act.

This definition is also part of the limitation placed on the scope of the consumer protection measures contained in Part 5. See sections 58 and 67.

"crops"

This definition relates primarily to section 37.

"debtor"

The definition of "debtor" gives a meaning to the term that is somewhat broader than it has in common English usage. It is clear that under the Act a debtor can be someone other than a person who borrows money or obtains credit and who gives a security interest in his personal property to secure the debt.

In order to be a debtor under the Act, a person need not have received personally a benefit under a security agreement. When one person has incurred the primary obligation and another person has provided collateral to secure the obligation, the second person is also a debtor since he "owes payment ... of the obligation secured" to the extent that his property can be used as a source of repayment of the obligation.

The definition also encompasses a person who has contractually guaranteed the performance of an obligation but has not given a security interest in his property to the creditor of the principal debtor.

While the term "debtor" includes a person who has given a security interest in his property to secure an obligation and a person who has guaranteed payment of the obligation but has not given a security interest as part of the guarantee, it is clear that the use of the term in a section of the Act does not necessarily refer to both types of debtors. Each section in which the term appears must be examined to determine from the context of the section what type or types of "debtor" are being referred to.

It is important in some contexts that the definition include a person who succeeds to the interest of the original debtor. The definition identifies those sections in which the term "debtor" does not include a transferee of the original debtor.

"document of title"

The current law of British Columbia dealing with documents of title is a mixture of common law concepts and statute law patterned on the law of United States jurisdictions. The definition of document of title contained in the Act is broad enough to encompass non-negotiable documents such as a "straight bill of lading" and a non-negotiable warehouse receipt under the Warehouse Receipts Act and "negotiable" documents of title such as an order bill of lading and a negotiable warehouse receipt under the Warehouse Receipts Act. The section, however, does not explicitly set out the difference between negotiable and non-negotiable documents of title; this is left to the general law of the province. The distinction between the two types of documents of title is, however, important in the context of some of the provisions of the Act. See e.g. sections 26, 27 and 31(4).

"equipment"

See comment to the definition of consumer goods. Note that equipment is a residual category: goods that are not within the definitions of consumer goods or inventory are, by necessary inference, equipment.

"financing change statement"

See comment to the definition of financing statement.

"financing statement"

The term financing statement in a section of the Act may be a reference to either a financing statement or a financing change statement as prescribed by regulations or a document deemed registered under section 77. However, a reference in a section to a financing change statement cannot be read as a reference to a financing statement; it is a reference only to a financing change statement.

"fixtures"

This definition relates to the system prescribed by section 36 under which security interests can be taken and perfected in goods that are attached to land. See comment to the definition of building materials.

"future advances"

This definition relates primarily to section 35(5)-(6).

"instrument"

In addition to referring to those types of documents generally falling within the common understanding of the term instrument, this definition extends to include letters of credit and advices of credit that by their terms require transfer of the writing in order to transfer the right to the payment contemplated by the writing. This is a departure from traditional Anglo-Canadian law relating to letters of credit under which transfer of the right to payment arising under a letter of credit was transferred as a simple chose in action. There is evidence that practices in Canada are changing; letters of credit and advices of credit are beginning to acquire aspects of "negotiability" to the extent that the rights they represent are treated as being transferable by delivery of the letter of credit or advice of credit if the writing so provides. The Act has been designed to accommodate these new practices. See e.g. section 31(3).

"intangible"

See comment to definition of account.

"inventory"

See comment to definition of consumer goods.

"knowledge"

While the Act rejects the concept of "constructive notice" (see section 47) it applies an objective test to the determination as to whether or not a person has knowledge. Accordingly, where a person's rights are affected one way or another depending upon whether or not the person has knowledge of certain facts at a particular time (see e.g. sections 20(c)(iii), 30(1)-(5), 31(2)-(5)) the relevant inquiry does not focus on what the person actually knew at that time, but what, under the circumstances, a reasonable person would take cognizance of and, therefore, know.

Where partnerships and corporations are involved, the definition identifies which of the agents or officers are representative of a business organization for the purposes of receiving knowledge.

"lease for a term of more than one year"

This definition identifies the types of true leases that are brought into the conflict of laws, perfection and priority provisions of the Act under section 3(b).

The definition is designed to encompass all leases that have a term of more than one year or which in all likelihood will extend in fact beyond a term of one year. Subclause (c) operates very differently from subclauses (a) and (b). The first two subclauses describe leases that from their inception are deemed to be leases for a term of more than one year. Subclause (c) deals with the situation in which a lease was initially intended to have a term of one year or less, but in fact turns out to be a lease for more than one year as a result of overholding by the lessee or some other arrangement under which the lessee remains in possession for a period in excess of one year. In such a case, the lease becomes a lease for a term of more than one year (and therefore falls within the conflict of laws, perfection and priority provisions of the Act) as soon as the lessee's possession extends beyond one year.

"pawnbroker"

This definition relates exclusively to section 55(3) which provides that Part 5 of the Act (dealing with default rights and remedies) does not apply to secured transactions in which the secured party is a pawnbroker. However, all other features of the Act do apply to such transactions.

"proceeds"

This section describes a category of collateral on the basis of its origin: personal property, fixtures or crops derived from a dealing with collateral. In order for the property to be proceeds, it must be possible to identify it as property derived from a dealing with collateral or must be property in which the security interest in the original collateral can be traced. Since the Act does not provide tracing rules, it is intended that appropriate tracing rules of equity be applied.

The definition includes property derived from any dealing with proceeds. Accordingly, the Act recognizes proceeds of proceeds collateral.

Since insurance payments are not derived from a "dealing" with collateral or proceeds collateral, it is necessary to extend the definition to encompass such payments.

The distinction between cash and non-cash proceeds is relevant in the context of section 28(2)(c).

"purchase"

The term purchase has a much wider connotation than that given to it in modern commercial useage. It is not confined to a sales transaction; it includes a wide range of transactions enumerated in the definition, including a security agreement.

"purchase money security interest"

Purchase money security interests are given a special status under the Act. The policies underlying this special status are examined in the context of each section providing for this status.

Two types of transactions are encompassed in the definition: installment sales contracts under which the obligation of the buyer is secured in whole or in part by a security interest taken by the seller in the goods involved; and loan transactions where money or other value is given in order to enable the borrower to acquire rights in collateral and where the lender is given a security interest in the collateral. It is not enough to show that the debtor obtained the loan from a secured party and acquired the collateral. In order for a security interest to qualify under clause (b) it is necessary to establish in addition that the loan was made for the purposes of acquiring rights in the collateral.

The interests of lessors under leases for a term of more than one year and the interests of consignors under commercial consignments approximate those of sellers under installment sales contracts and, therefore, warrant treatment under the Act as purchase money security interests.

The section makes it clear that an obligation secured by a purchase money security interest includes the credit and interest charges payment to be made by the debtor.

"secured party" In the enumerated sections, the term secured party refers as well to a receiver or receiver-manager. This implements a central feature of the approach taken by the courts and embodied in the Act under which a receiver who is acting on behalf of and, in some cases, under the directions of a secured party is subject to the same regulatory regime that would be applicable if the secured party had proceeded to enforce his security interest without appointing a receiver.

"security"

The definition of security is very broad and open-ended. It encompasses shares in closely-held or private companies. The definition has been drafted to accommodate the growing practice of using uncertificated securities, i.e. securities issued to a named person solely in the form of an entry in the records of a clearing corporation. See section 24.

"security interest"

Although the concept of "security interest" is central to the Act, the term is defined in a very general manner. This is in line with the approach embodied in section 2 under which the Act is described as applying to transactions that in substance are security agreements. As to the significance of form and the locus of "title" in the creation of security interests, see the Comment to section 2.

The extension of the definition to include interests of lessors under non-security leases, interests of consignors under non-security commercial consignments and interests arising from non-security transfers of accounts or chattel paper complements section 3(b).

The definition makes it clear that when goods are shipped under an order bill of lading or equivalent shipping document, the interest of the seller is not to be treated as a security interest unless there is additional indication that the parties intended a more elaborate security arrangement. While technically the seller's interest is an interest in goods that secures performance of the buyer's obligation to pay the purchase price, there is no good reason to bring this type of arrangement within the scope of the Act unless the parties wish this to be the case.

"specific goods"	See definition of "chattel paper".
"trust indenture"	This definition relates primarily to sections 50 & 53.
"value"	See comment 2 to section 12.

Section 2 - Scope of Act: Security Interests

1. This section, along with section 3, defines the scope of the Act. It is clear from the sections that the Act in its entirety applies to all generic security agreements whatever their form. In addition, certain aspects of it apply to transactions that are not security agreements. See section 3.

2. The Act departs from existing personal property legislation in British Columbia by employing a "substance" test for use in characterizing transactions as being within or outside its scope. It does not matter what form a transaction takes and what the parties to the transaction call themselves. If the transaction in substance is one that involves the recognition that one party has an interest (security interest) in property of another, taken to secure payment or performance of an obligation, the Act applies to the transaction.

There is another feature of the Act that sets it apart from existing law. It is clear from section 3 that a security interest can be created without a transfer of title from one party to another. The Act rejects any suggestion that a particular formula providing for the transfer of title by the debtor to the secured party or retention by the secured party of title to collateral is necessary to the creation of a security interest. It may be important for other purposes (see Indian Act R.S.C. 1970, c. I-1, section 89(1)) to have such clauses in a security agreement; however, their absence from the agreement has no effect on the question as to whether or not the Act applies to it. Although the transfer or retention of title or property is not involved in the creation of a security interest, it does not follow that the concepts of property and title are irrelevant to the system established by the Act. In order for a security interest to come into existence (attach), inter alia, the debtor must have rights in the collateral. See section 12. To this extent, the common law principle, nemo dat quod non habet, remains important. However, a security agreement need not identify the nature and extent of the debtor's interest nor need it contain any words providing for the transfer of that interest to the secured party.

3. Section 2(2) contains a non-exclusive list of traditional types of security agreements which fall within the scope of the Act. A security agreement falling within the Act may, but need not, take the form of any of these transactions.

4. Section 2(2) also contains a list of transactions that under existing law would not be considered security agreements. These are mentioned as being transactions within the Act since under existing law they do not fit into the traditional categories of security agreements and, consequently, their function as security agreements is overlooked. For example, it is common practice to include in financing agreements "trust proceeds clauses" under which the debtor agrees to hold proceeds from the sale of collateral "in trust" for the secured party. The arrangement is generally recognized as creating a valid trust. The security function of trust proceeds clauses is given little recognition since it is not in the form of a mortgage or some other traditional form of security agreement. Since section 2 of the Act focuses on substance rather than form, the security feature of a trust proceeds clause brings it within the Act. It may still produce for other purposes a valid trust, but for the purposes of the Act, it is a clause in a security agreement that has the effect of providing for a security interest in proceeds of collateral. As such the system of the Act and not the law of trusts regulates inter partes rights of the debtor and the secured party as well as any conflicting priority claims to the proceeds involving the secured party and third parties.

Section 3 - Scope of Act: Non-security Interests

1. Section 3 contains a list of transactions that are not generic security agreements since they do not secure payment or performance of an obligation. They are deemed security agreements and are brought within the conflict of laws, perfection and priority provisions of the Act. They do not, however, come within those provisions of the Act (see Part 5) that prescribe the rights and remedies of the parties in the event of default by the debtor.

2. Section 3 brings within the conflict of laws, perfection and priority provisions of the Act non-

security transfers of accounts. Under existing British Columbia law, the priority rules applicable in cases of successive assignments of an account are the same whether the assignment involves a sale of the account or a transfer of it for security purposes. Accordingly, in this respect, the Act will change little. However, since the priority system of the Act is centered around registration, the Act will necessitate the registration of a much wider range of assignments than is the case under existing law. At the same time, it will ensure greater certainty for business transactions by providing a public record of assignments and by displacing the troublesome priority rules of existing law with a set of rules that are more rational and predictable.

3. One of the innovative features of the Act is its recognition of chattel paper (see definition) as a separate type of collateral (or deemed collateral) and not two separate type of personal property (a chose in action and a security interest in goods), as is the case under existing law. The Act prescribes a set of priority rules applicable to transfers of chattel paper (whether for security purposes or pursuant to a sale of it) under which chattel paper is treated as quasi-negotiable property.

4. Section 3 brings within the conflict of laws, perfection and priority provisions of the Act commercial leases having a term of more than one year and commercial consignments. For definitions of these terms, see section 1.

The inclusion of certain types of true leases in the priority structure of personal property security legislation is not a concept foreign to the law of British Columbia. See Sale of Goods on Condition Act R.S.B.C. 1979 c. 373, s.1 (definition of "conditional sale").

While conceptually the distinction between a true consignment and a security agreement is clear, in practice, consignments are used as financing devices.

True leases and true consignments have one feature in common with security agreements. They create a potential for deception of innocent third parties who deal with the lessee or consignee in the belief that no one else has an interest in the goods held by the lessee or consignee. Traditionally, Canadian legislators in common law provinces have dealt with the problem of deception resulting from the separation of interest from possession in the context of security agreements and certain types of leases used as security agreements by requiring secured parties and lessors to provide public disclosure of their interests by registration in a public registry. This policy is retained in the Act but in an expanded and refined form.

It is totally unrealistic to attempt to bring within the scope of the Act every kind of transaction that creates the potental for deception of third parties resulting from the separation of possession and interest. However, it is realistic to include certain types of transactions which, because of their commercial importance and their use as substitutes for security agreements, are likely to continue to produce injustice and commercial disruption if public disclosure of their existence is not required. Long term leases and commercial consignments fall into this category.

The decision to limit the scope of the Act to leases for a term of more than one year involves an element of arbitrariness. There is no empirical evidence establishing that a lease for an eleven month term is less likely to be an instrument of deception than a lease with a term of thirteen months. However, a cut-off is required in order to avoid bringing within the Act the thousands of short term vehicle and equipment rental arrangements that occur every day in British Columbia.

Leases and consignments that are in substance security agreements are brought within the scope of the Act by section 2 and not by section 3. Consequently, whatever their term or duration they are treated for all purposes, including inter partes rights on default, as security agreements. In jurisdictions where true leases are not brought within the scope of a Personal Property Security Act, so much legal uncertainty exists as to whether particular lease transactions are true leases or security leases that most lessors register their interests in the Personal Property Registry.

Section 4 - Exclusions From Scope of Act

1. This section sets out a list of transactions to which the Act does not apply. While some of them are not security agreements, others are and, in the absence of section 4, would fall within the scope of the Act. The security agreements in the list are excluded for commercial, administrative and public policy reasons.

2. Section 4(a) makes it clear that a security interest created under a system of law established by the Parliament of Canada that contains its own inter

partes and priority rules does not fall within the scope of the Act. For example, while the Act applies to security interests in vessels, it does not apply to to those registered under the Federal Shipping Act. Security interests created under section 178 of the Bank Act are specifically excluded.

3. Section 4(b) is technically unnecessary since the Act applies only to interests arising under security agreements and not to any type of interest that is created by statute or that arises by operation of law. However, because of the novelty of the Act, the section has been included ex abundanti cautela in order to avoid any confusion in this respect.

It is not uncommon for interests in insurance policies to be used as collateral to secure debt. However, it has been concluded in all jurisdictions which have enacted a Personal Property Security Act that there is no demonstrated need to subject this practice to the regulatory regime of this legislation. An apparently effective system for regulating priority disputes involving insurance interests is contained in insurance legislation. See Insurance Act R.S.B.C. 1979, c.200, section 151. Section 4(c) reflects this conclusion. Of course, a right to payment under an insurance policy that is compensation for damages to collateral must be within the scope of the Act since it is proceeds of the collateral. See definition of "proceeds" in section 1.

4. Section 4(d) excludes from the Act a transfer of an unearned right to payment arising under a contract where the transferee is to perform the transferor's obligations under the contract since in such a situation there is little likelihood that the transferor will be in the position to deceive anyone concerning his right to receive the payment.

5. Section 4(e) addresses the troublesome question as to the extent of overlap between personal property law and real property law. For example, for some purposes a real property mortgage is characterized as personalty; yet, the same type of interest is subject to the Land Title Act. Commercial certainty requires that the applicable law be identified with clarity. Except to the extent that the Act deals with security interests in fixtures and growing crops, the regulation of interests in property falling within the scope of the Land Title Act is left to real property law.

6. Section 4(f) amplifies the policy of section 4(e) in the context of interests that are clearly personalty but are associated with real property interests. Accordingly, transfers of lease payments or mortgage

payments are excluded from the scope of the Act because of their close association with real property interests.

There is an important exception to the general exclusion contained in section 4(f). The Act does apply to the transfer of a security notwithstanding that the obligation represented by the security may be secured by an interest in land. While the transaction providing for this real property security interest is clearly excluded from the Act by virtue of section 4(e), a security interest in the security itself is not.

7. When sale of a business includes accounts or chattel paper associated with the business, there is little likelihood that third parties will be deceived into thinking that the vendor remains owner of the accounts or chattel paper unless he continues in control of the business after the sale. Accordingly, a transfer of these accounts or chattel paper need not be brought within the regulatory regime of the Act. Section 4(g) embodies this conclusion.

8. Sections 4(h)-(k) exclude from the scope of the Act miscellaneous assignments which are either of no commercial significance or are of a type the regulation of which would be inappropriate under the Act.

Section 5 - Law Applicable: General Rules for Goods and Collateral in Possession of Secured Party

1. Section 5(1) prescribes the law applicable to the issues of validity, perfection and the effects of perfection and non-perfection of security interests in goods (other than goods falling within sections 6 and 7) and non-possessory security interests in securities, instruments, negotiable documents of title, money and chattel paper. The governing law is the law of the jurisdiction where the collateral was situated (*lex situs*) at the date the security interest attached. Other issues that arise in the context of a security agreement are governed by the law prescribed in section 8 or by the common law rules of private international law.

2. While there is no counterpart to section 5(1) in existing British Columbia personal property security law, there is a counterpart to section 5(2). See e.g. *Chattel Mortgage Act* R.S.B.C. c.48, section 8. The effect of section 5(2) is that a security interest in goods perfected under the laws of another jurisdiction is recognized as being perfected in British Columbia

for a period of time but only if certain measures are taken by the secured party. The period of temporary perfection allowed by section 5(2) to a security interest that is perfected when the goods are brought into the Province varies depending upon the knowledge of the secured party and upon whether or not the perfection of the security interest under the applicable law is maintained. However, in no circumstance is it temporarily perfected for a period longer than 60 days. The period could be much shorter than this. Temporary perfection will end upon the earliest happening of:
(1) the expiry of 60 days from the date that the goods are brought into the Province; (2) the expiry of 15 days from the date that the secured party learns that the goods have been brought into the Province; or (3) the termination of the perfection of the security interest under the applicable law as specified in section 5(1). The temporary perfection recognized in section 5(2) is conditional not absolute; it depends upon perfection as prescribed in the section. In other words, a security interest that is not ultimately otherwise perfected as required by the Act has no temporary perfection in the Province.

3. There is an important qualification to the temporarily perfected status given to foreign security interests by section 5(2). While the holder of this security interest can rely on this form of perfection to give him priority over subsequent security interests acquired in British Columbia or over the debtor's judgment creditors who have taken enforcement proceedings in British Columbia, he cannot rely on it to give him priority over a British Columbia buyer who acquires without knowledge and for value an interest in the goods after they come into the Province and before the security interest is perfected in the Province. The effect of this qualification is to allow buyers of goods to rely on the information available in the Personal Property Registry and to avoid the trap which existing law sets for them by providing "grace periods" for the registration of foreign security interests. This feature of the Act is an aspect of the policy decision embodied in other sections of the Act under which good faith buyers are universally protected from being subordinated to a security interest that is deemed perfected (temporarily perfected) even though the collateral remains in the hands of the debtor and no financing statement has been registered disclosing the security interest.

Section 6 - Law Applicable: Parties Intend Goods to be Removed From Jurisdiction

1. Section 6(1) states an exception to section 5, applicable in cases where the security interest attaches while the goods are in one province but where the parties intend that shortly thereafter the goods will be moved to another jurisdiction and the goods are in fact so moved. Under these circumstances, it makes little sense to apply the lex situs rule of section 5 to determine the law applicable to issues of validity, perfection and the effect of perfection and non-perfection of the security interest. This section will have its most important effect in the context of secured installment credit sales of goods made in border towns or cities where the buyers have come from the neighbouring jurisdiction to buy goods but who intend to return home immediately with the goods.

2. Section 6(2) addresses a small technical question that may arise in the context of a situation to which section 6(1) applies. If the jurisdiction in which the security interest was taken was British Columbia, it would not be a security interest to which section 5(2) applies notwithstanding the fact that under section 6 the applicable law is not British Columbia. Section 6(2) deems such a security interest to be one to which section 5(2) applies so as to ensure that it is treated like any other foreign security interest.

Section 7 - Law Applicable: Mobile Goods, Intangibles, Etc.

1. Sections 7(1) and (2) prescribe a choice of law rule dealing with the issues of validity, perfection and the effect of perfection and non-perfection in the context of types of collateral which either do not have a situs or which do not have a stable enough situs on which to base a choice of law rule. Under the sections, the law applicable to security interests in intangibles (which have no situs), non-possessory security interests in instruments, negotiable documents of title, money and chattel paper (all of which have a negotiable or quasi-negotiable, and therefore highly mobile character), and security interests in goods held as equipment or as rental inventory that are of a type normally used in more than one jurisdiction (and therefore having a constantly changing situs), is the law of the place of location of the debtor at the date the security interest attaches. The assumption underlying the section is that the debtor's location is the most stable connecting factor available for a source of applicable law.

2. The effect of the section is that although the collateral may be situated in the Province when the security interest attaches, it is the law of the

debtor's location that governs, not the law of the Province.

3. The difference between section 5 and section 7 is not confined to the connecting factor used. Under section 5, the applicable foreign law, to the extent that it deals with the requirements of perfection, is displaced by domestic law applicable to perfection of security interests in goods situated in the Province. However, under section 7, with one exception set out in section 7(4), the foreign law governs the issue of perfection (registration of the security interest) even though the collateral is within the Province. This is so even though the collateral never leaves the Province.

4. It is the policy of the section that third parties who wish to determine whether or not collateral of the type mentioned in the section is encumbered must determine where the debtor is located and conduct a search in that jurisdiction for evidence of any security interests. It follows that if this policy is to work properly there must be some assurance that security interests recognized by domestic law as being perfected are in fact registered or in some other way disclosed to the public in the jurisdiction where the debtor is located when third parties are seeking to discover this information. Accordingly, section 7(3) requires as a condition of the continued recognition of perfected status of the security interest in the Province that the security interest be perfected within the prescribed period of time in any other jurisdiction to which the debtor has changed his location or in which any transferee of the debtor's interest in the collateral is located.

5. The system that section 7 establishes will fail to provide the necessary notice of the existence of security interests in collateral if the debtor is located in a jurisdiction which recognizes the perfection of security interests in the collateral of the types named in the section without the need to provide public disclosure of their existence. This will be a common state of affairs in Canada until all provinces adopt Personal Property Security Acts. For example, under existing British Columbia law an assignment of a specific account, even though made to secure an obligation, need not be registered anywhere in order to be perfected. It is perfected if the account debtor is informed of its existence. However, there is no legal obligation on the account debtor to give information to third parties as to its existence.

Section 7(4) is designed to ensure that third parties who acquire interests in collateral that is situated in the Province when those interests are acquired will have a reliable method through which to discover whether or not the collateral is subject to security interests recognized as valid and perfected under British Columbia law. Note it is just the issue of perfection that, in this narrow context, is regulated by domestic law. Issues such as validity and the effect of non-perfection are still determined by the applicable law as prescribed in section 7(2).

Section 8 - Law Applicable: Substance and Procedure

1. Section 8 provides choice of law rules applicable to issues that arise in the context of the enforcement of security interests. The section adopts the common law distinction between procedural and substantive issues, leaving the former to be regulated by the law of the jurisdiction in which enforcement is being sought, and the latter to the proper law of the contract . The Act does not specify choice of law rules for all aspects of security agreements. Accordingly, the common law retains a role in determining the law applicable to matters not dealt with in the sections 5-8.

2. The concept of "perfection" is peculiar to the Personal Property Security Act. Consequently, where the applicable law is that of a jurisdiction that has not yet enacted this type of legislation, the question will arise as to what constitutes perfection under this law. Section 8(2) is designed to provide some guidance to the courts on this question.

Part 2. Validity of Security Agreements and Rights of Parties

Section 9 - Effectiveness of a Security Agreement

This section declares a basic feature of the Act: the parties are free to tailor their security agreements in a manner that most appropriately facilitates their relationship. This is not, however, an unlimited freedom. There are some constraints designed to ensure minimum fairness and commercial reasonableness and to preserve the essential features of a security agreement.

Section 10 - Writing Requirements for Security Agreements

1. This section prescribes a writing requirement for security agreements in all cases other than those under

which the secured party has possession of the collateral. The section is not, however, the equivalent of a statute of frauds since it does not make unenforceable as between the parties an oral non-possessory security agreement. Failure to comply with the section renders the security interest unenforceable only as against third parties.

The purpose of the section is to provide a tangible record of the existence of the legal relationship between the parties. Under section 18 certain persons are entitled to obtain from the secured party a copy of the security agreement. This is an aspect of the notice registration system that the Act employs under which notices of the existence or potential existence of security interests are on public record and not copies of security agreements. Section 10 prescribes the minimum contents of the security agreements that must be made available under section 18.

2. Section 10 contains guidance as to the methods that may be used when describing collateral in security agreements. Since the function of the section is to facilitate the disclosure of information that third parties require when making the decision whether or not to deal with the debtor, a key aspect of the written security agreement will be the description of the collateral in which the secured party has a security interest. In many situations, however, an itemized collateral description is not possible since the collateral may include a wide range of different types of property and may be constantly changing. Accordingly, the section provides a great deal of flexibility, allowing generic descriptions (type), all property descriptions, all property other than specific items or types of collateral descriptions and descriptions of collateral as inventory, if the collateral is held as inventory.

3. The Act divides goods collateral into three categories: consumer goods, inventory and equipment. All collateral in the form of goods must fall into one of these three categories. However, the differences between the categories are not differences based on essential characteristics of the goods in the categories; the differences are based on the use being made of the goods by the debtor at the relevant time. Accordingly, to describe goods as consumer goods only discloses that the collateral is goods which at the time the security agreement was signed were acquired or were being used by the debtor for personal, family or household purposes. It does not disclose that the collateral is an automobile, a truck, stereophonic equipment, etc. Under the scheme of the Act, a dairy

cow is "equipment" when used as a source of milk that is being sold by its owner. In the space of a single day, an automobile may be inventory, equipment or consumer goods depending upon the use being made of it by the debtor. An inquiring party needs more than a use description of goods when he makes the determination whether or not to deal with the debtor.

It is for this reason section 10(3) provides that without more, a description of goods as consumer goods or as equipment is inadequate for the purposes of the section. An exception, however, is made for inventory. While this is a use and not a generic description of goods, as a matter of practice it is used in circumstances where generic descriptions of collateral are more difficult to provide and where third party deception is less likely to result from its use. It is to be noted, however, that under section 10(4), a description of goods collateral as inventory is valid only so long as the goods are held by the debtor as inventory. If goods held by the debtor as inventory at the date of the security agreement are later used by him as consumer goods or as equipment, the collateral description of the goods as "inventory" with nothing more, would become inadequate for the purposes of section 10 as soon as the debtor changes the use to which he is putting the goods.

4. Under existing law a floating charge can be taken on all of the "undertaking of the company." Under the Act, the equivalent will be a security interest in all of the debtor's present and after-acquired personal property.

5. Since in some situations it will be impossible at the time the security interest is executed to determine what form proceeds will take, section 10(5) dispenses with the need to include a description of this type of collateral in security agreements.

6. Except in cases where serial numbers are required by regulation and where proceeds collateral is involved, the collateral description contained on a security agreement can be transcribed to the financing statement that is registered to perfect the security interest created by the security agreement.

Section 12 - Attachment of Security Interests

1. Under section 12 a security interest "attaches" where the requirements of the section have been met. The concept of attachment is the direct equivalent of creation; a security interest is created or comes into existence when it attaches. The section sets out the

prerequisites of attachment: value, acquisition of rights in the collateral by the debtor and an enforceable security agreement.

2. The term "value" is defined in section 1 to mean any consideration sufficient to support a valid contract but includes as well, antecedent debt or liability. In the great bulk of cases, the consideration given by the secured creditor is the promise to grant a loan or extend credit. Accordingly this requirement will be satisfied as soon as the security agreement is made, so long as the agreement places an obligation on the secured party to extend credit facilities to the debtor. In a case where the secured party retains complete discretion as to whether or not to grant credit to the debtor, there would not be value to support attachment of the security interest until credit is granted unless some other consideration is given to the debtor. Since antecedent debt is good consideration, an unsecured obligation can be converted into a secured obligation without new consideration.

3. Another prerequisite to attachment is that the debtor has rights in the collateral. A security interest is by definition an interest in the debtor's property, although it can be created without any transfer of property by the debtor to the secured party. Unless the parties indicate a contrary intention, attachment occurs automatically when the debtor acquires rights in the property taken as collateral (assuming that the other requirements of section 12 have been fulfilled).

The Act does not indicate what constitutes rights sufficient to satisfy section 12. Accordingly, the principles of the common law of property are to be applied. Anything that qualifies as property rights at common law would be sufficient for the purposes of section 12. This would exclude mere contract rights to possession, although it likely includes actual possession by the debtor.

Of course, the security interest created by the debtor cannot give to the secured party rights to the collateral as against anyone else holding a proprietary interest in the collateral greater than that held by the debtor. However, priorities among holders of security interests are not affected (as they are at common law) by the nature of the interest held by the debtor at the time each interest was created. Section 12(2) states a statutory presumption as to rights in collateral held by a debtor under a lease or a consignment. The section removes any question as to whether or not a lessee or a consignee has rights in collateral sufficient to support a security interest. Leases of goods and, to a lesser extent, consignments of goods are of sufficient commercial importance that there should be no impediment to or uncertainty associated with the creation of security interests in lessees' and consignees' interests. The section applies to leases and consignments to which the Act applies (deemed security interests under section 3) and to leases and consignments not otherwise within the scope of the Act.

4. Section 12(3)(b) and (c) should be read in a positive as well as a negative way. A debtor is declared by these sections to have rights in crops after they become growing crops and to have rights in the unborn young of animals as soon as they are conceived. Accordingly, a separate security interest can be taken in an embryo in which the debtor has rights even though the debtor may not have rights in the mother or carrier of the embryo.

5. Section 12(1)(c) makes enforceability of the security interest as against third parties one of the prerequisites to attachment. However, a security interest will attach on an inter partes basis sufficient to allow the secured party to enforce his security interest against the debtor even though the security agreement is unenforceable against third parties as a result of non-compliance with section 10.

6. Section 12(1) makes specific reference to floating charges. This reference is included ex abundanti cautela. A floating charge is a non-specific but present equitable charge that crystallizes upon the happening of certain events. Until crystallization the debtor is free to deal with its assets without interference by the charge holder. This freedom may (and almost always is) limited by restriction clauses in the security agreement.

It is clear that the concept of a non-specific floating security interest cannot be accommodated within the scheme of a Personal Property Security Act. Parties are free to use the floating charge form under the Act; however, this does not mean that they can thereby import into the scheme of the Act the complex matrix of third party priority rules which the courts of equity developed in the context of floating charges. The Act recognizes only two legal states for security interests: attached but unperfected and attached and perfected. It does not recognize a perfected but non-specific or floating security interest. If the parties intend attachment to occur when the debtor gets rights in collateral or, are silent on the point, the secured party's interest becomes a specific fixed security interest once the other conditions of section 12 are met. The reference to floating charges in section 12 is to ensure that the use of a floating charge form of security agreement is not interpreted as an indication that the parties do not intend the security agreement to attach until crystallization.

The conversion of a floating charge to a specific charge that occurs under the Act results in both conceptual and functional changes in the nature of the floating charge. Crystallization will no longer have any significance to the priority position of the secured creditors and will cease to be an aspect of floating charges. Since the charge will be specific, the debtor's power to deal with the collateral will become an implied or expressed licence and the priority position of unsecured creditors dealing with the debtor will be determined under the applicable priority rules of the Act and will not be dependent on the determination as to whether or not the charge was still floating when the interests of such persons were created.

Because the floating charge will be converted to a fixed charge, there will be a significant impact on the priority presently enjoyed by many statutory liens in favour of the Crown. Accordingly, consequential amendments will be made to the various taxation statutes giving rise to those liens. Specifically, that legislation will be amended to expressly provide that claims of the Crown will have priority over all PPSA security interests, including interests that were perfected or that attached prior to the date on which the Crown's claim first arose.

Section 13 - Security Interests in After-Acquired Property

1. Section 13(1) is a key feature of those aspects of the Act designed to facilitate inventory, accounts receivable and other forms of financing where the debtor does not have an interest in all or some of the collateral at the date the security agreement is executed. Under the section, the security interest in the collateral attaches automatically as soon as the debtor acquires the collateral. There is no need (as there now is at common law) for the debtor to appropriate the property to the contract after he acquires it; it becomes collateral by operation of section 12.

2. Section 13(2) states two limitations on the efficacy of after-acquired property clauses. These

limitations are based on public policy considerations and not on any conceptual or functional difficulties. The limitation applicable to crops is designed to ensure that agricultural producers are not forced by harsh economic circumstances to encumber for long periods into the future their income from crop production. The effect of the section is to place an agricultural producer in the position of controlling on a year to year basis whether or not his crops for the upcoming year will be available as security.

The limitation applicable to consumer goods is designed to control the use of "blanket" or "dragnet" clauses in consumer security agreements under which unsophisticated consumer borrowers unwittingly encumber all of their present and future assets thereby placing into the hands of secured creditors the power to seize all of the debtors' personal property, including necessaries, in the event of default. After-acquired property clauses are recognized as being effective if a purchase money security interest is involved. This exception to the general prohibition is designed to facilitate consumer loans where the security for the loan is property bought with the proceeds of the loan after the loan is made. The second exception recognizes that a secured creditor should be able to have a security interest in collateral acquired by the debtor as a replacement for the original collateral which has been destroyed or disposed of by the debtor.

Section 14 - Future Advances

One of the features of the Act designed to facilitate business financing is the system for securing lines of credit. Section 14 confirms that a security agreement may provide for future advances. However, since the section does not address priorities, which is obviously the most controversial issue in future advance financing, it is only one aspect of this system. The priority position of a future advance financer is dealt with in section 35.

Section 15 - Application of Sale of Goods Law

Secured instalment sales of goods have two aspects: a sales aspect and a security aspect. Section 15 makes it clear that the Act should not be read as addressing the sales aspect.

Section 16 - Acceleration Clauses

Acceleration clauses are a common feature of security agreements that provide for instalment payment or performance of the debtors' obligations. Most acceleration clauses provide for acceleration when an event occurs (e.g. default in payment, bankruptcy, etc.). However, others purport to give the secured party the right to accelerate performance when he determines that his position is insecure. The section does not prohibit the use of such clauses; however, it prescribes an objective test rather than a subjective test to be applied when determining when a secured party may invoke the right to acceleration on the basis of such a clause. Commercial reasonableness is the central requirement of this list.

Section 17 - Rights and Obligations of Secured Parties in Possession of Collateral

1. This section sets out the rights and obligations of a secured party with respect to collateral in his possession under a security agreement providing for perfection by possession or as a result of seizure of collateral to enforce a security interest in it.

2. While some of the obligations prescribed by the section are subject to modification by agreement between the parties, the obligation in subsection (1) to use reasonable care while in possession of collateral cannot be disclaimed. The operation of this section may be affected as provided in sections 55(5) and 63.

Section 18 - Acquisition of Information from Secured Parties

1. This section is a key aspect of the notice registration system that the Act implements. Registration is effected under the Act, not by placing on the public record copies of security agreements, but by registering a single document called a financing statement. A financing statement contains basic information designed to inform third parties of the existence or potential existence of one or more security agreements between the secured party and the debtor named in it. Accordingly, the financing statement essentially contains only the names and addresses of the secured party and the debtor and a general or specific description of the collateral.

2. Since, under the notice registration system of the Act, copies of security agreements are not filed in the registry, a method must be provided through which third

parties such as buyers, lenders, and unsecured creditors of debtors can determine whether or not the property in the possession or control of the debtors with whom they are dealing is encumbered. This is the function of section 18. Its purpose is to give the legal right to specified third parties to demand and obtain from secured parties the detailed information not recorded on registered financing statements.

3. Unlike a system that requires the registration of security agreements, the notice registration system of the Act does not expose to anyone prepared to pay a search fee all of the details of a secured credit arrangement between parties. The right to demand detailed information under section 18 is limited to the debtor, a creditor, the sheriff and a person with an interest in the property to which a registration relates. The reason for giving this right to a debtor is obvious. A creditor is given this right since it is very common for unsecured creditors to rely on information in the registry to determine whether or not to expend further money to obtain a judgment and to invoke judgment enforcement measures against property of the debtor. Similarly, a sheriff who is required by law to seize property under writs of execution but who, at the same time, is prohibited from interfering with the rights of third persons, including the rights of secured creditors, must have a method of determining with a great deal of accuracy what items of property in the hands of an execution debtor are collateral under a security agreement. A person with an interest in the collateral will need detailed information as to any security interest in the collateral since his rights may well be adversely affected by the exercise of the rights given to a secured creditor by the Act and by the provisions of a security agreement.

A credit grantor who has not loaned money or given credit to the debtor but who is assessing the risks associated with doing so is not given a right on his own initiative to demand and obtain detailed information from the secured party. What he must do is to require the debtor to make the demand and to have the information sent directly to him. Section 18(1) facilitates this procedure by giving the debtor a right to specify the person to whom the detailed information is to be sent.

4. Sections 18(5) - (7) provide the sanctions associated with a refusal to respond as required by the section 18(1). The consequences of a conscious refusal to provide the information as required can be severe, including the loss of a security interest. However, it

will be only in very extreme situations that this remedy will be invoked.

5. Section 18(9) creates a statutory estoppel against the person who supplies incorrect information in response to a demand. It is not enough to give to a third party who has obtained information under this section a right to recover damages he has suffered as a result of reliance on incorrect information supplied to him. In order to avoid disruption in the business planning of the inquiring party, he must be able to act on the assumption that the information supplied to him under the system is accurate or is deemed in law to be accurate.

6. It often happens that after a financing statement is registered, the secured party assigns his interest in the security agreement to a third party who becomes in law a secured party. If a financing change statement is registered disclosing the assignee as the secured party, no problems result. Any inquiries by third parties will be directed to the new secured party. However, if the registry records are not changed through registration of a financing change statement so as to disclose the new secured party, the inquiries may not be directed to the proper person. To deal with this problem, section 18(6) requires the original secured party to disclose the identity of his successor in interest. Further, the successor in interest is estopped under section 18(10) from denying the accuracy of information supplied in response to a demand unless the person making the demand knows of the existence of the successor in interest or unless the registry records have been amended so as to disclose the identity of the successor in interest.

Part 3. Perfection and Priorities

Section 19 - When Security Interests Perfected

1. The term "perfection" as used in this section displays the American origins of Canadian Personal Property Security Acts. The term originated in United States bankruptcy law and was included in Article 9 of the Uniform Commercial Code.

2. A perfected security interest is one that has a status that protects it from being subordinated to unsecured creditors, the trustee in bankruptcy and, in some situations, other perfected security interests. However, a perfected security interest does not necessarily have first priority. It may be subordinate to other perfected security interests in the same

collateral or to other interests such as the interest of a buyer of the collateral. All that perfection connotes is that a security interest exists (it has attached as provided in section 12) and such measures have been taken as are necessary to put the interest in a position to compete with other interests.

3. Perfection arises automatically at the moment of the coincidence of attachment and completion of one of the steps required for perfection (registration, possession by the secured party or temporary perfection). For example, when a financing statement has been registered before a security agreement has been executed, there can be no perfection since there is no attachment. However, as soon as the debtor executes a security agreement providing for a security interest in property in which he then has rights, automatically and immediately the security interest is perfected.

4. The time of perfection does not necessarily determine the priority position of a security interest. For example, under section 35(1), a security interest may be the first to be perfected, but may be subordinate to a security interest that was later perfected but which was referred to in a financing statement registered before any other financing statement referring to the same collateral and debtor. Perfection is a necessary, but not a sufficient element of first priority status.

Section 20 - Subordination of Unperfected Security Interests

1. This section lists the types of interests that take priority over an unperfected security interest. Generally, these interests are the same types of interests against which an unregistered chattel mortgage or conditional sale is void under existing law.

2. In order to have priority over an unperfected security interest, an unsecured creditor must obtain judgment and cause the collateral to be seized or affected by a judgment enforcement measure. By so doing, the creditor elevates his unsecured claim to one which can be enforced against the collateral. While technically an equitable execution operates in personam against the debtor and is not a charge or lien against the assets to which it applies, it is treated by Section 20(a)(i) to be sufficient to raise the claim of the unsecured creditor to a status that, as a matter of public policy, should have priority over an unperfected

security interest in the debtor's property affected by the court order providing for the equitable executions.

3. The reference to the right of seizure of a sheriff under the Creditor Assistance Act is a reference to the power that the sheriff has under the Act to make additional seizures when certificates are filed after a levy has been made (Creditor Assistance Act section 12) and the right to obtain an order for the payment of money in court belonging to the debtor to the sheriff to be distributed under the Act (Creditor Assistance Act section 26).

4. A representative of creditors, other than a trustee in bankruptcy, does not have an independent status that would allow him to subordinate an unperfected security interest. He must assert the rights of a creditor he represents who has caused the collateral to be seized under legal process to enforce a judgment. This is consistent with his representative status.

5. Section 20(b) gives to the debtor's trustee in bankruptcy an independent status to subordinate an unperfected security interest. In this respect, the section perpetuates the position of a trustee in bankruptcy under current British Columbia personal property security law. A trustee is given this status because, after bankruptcy ensues, unsecured creditors are barred from pursuing provincial judgment enforcement measures. Bankruptcy proceedings are the substituted method through which the claims of unsecured creditors are enforced. Accordingly, section 20(b) is merely an extension of section 20(a)(i).

6. Under section 20(c), a transferee of the collateral has priority over an unperfected security interest in it so long as the transfer by the debtor is made for value and without knowledge on the part of the transferee of the existence of the unperfected security interest. The most common type of transferor will be a buyer of goods taken as collateral.

A transferee of negotiable collateral is given priority under section 31 even though the security interest in the collateral is perfected.

Section 21 - Measure of Damages Suffered by Lessor

Section 21 is designed to address a problem associated with the decision to include in the Act leases for a term of more than one year and commercial consignments. When a security interest is subordinated to the trustee in bankruptcy, the secured party remains a creditor and can prove his claim in bankruptcy as an unsecured creditor. However, when a lease or a consignment is subordinated to the trustee in bankruptcy, the lessor or consignor may be an unsecured creditor only to the extent of any damages suffered by him as a result of breach of the lease or consignment contract. Section 21 is designed to place lessors and consignors in the same position as secured creditors in this regard. In effect, it gives to them a right to claim as unsecured creditors for the value of the interest they have lost to the trustee.

Section 22 - Perfection of Purchase Money Security Interests

1. This section provides a "grace period" for the perfection of a purchase money security interest. Unlike current chattel registry legislation, the Act does not provide a grace period for all types of security agreements. It does give to secured parties in a few specific situations a period of time during which a security interest is either temporarily perfected without registration or possession by the secured party or deemed retroactively perfected. Section 22 provides for one of these situations.

2. The retroactive perfection provided in this section applies only to purchase money security interests and affects only unsecured creditors, a sheriff and a trustee in bankruptcy. Section 34 provides for retroactive perfection of a purchase money security interest that affects secured parties with prior perfected security interests. However, there is no section that affects a transferee for value without knowledge who acquires an interest in the collateral whether in or out of the ordinary course of business of the debtor. In this respect, the Act departs from current British Columbia law.

Section 23 - Continuity of Perfection

There are three methods through which a security interest in some types of collateral can be perfected: registration of a financing statement, possession of the collateral by the secured party and temporary perfection without registration or possession. A situation may arise in which it is necessary to use in succession two or three different methods to perfect a security interest in collateral. Section 23 ensures that, for the purpose of determining priorities, a change in method of perfection does not affect an established priority position. Accordingly, the time of perfection for the purposes of section 35 of a security interest initially temporarily perfected without registration or possession and later perfected by registration is the time when the temporary perfection begins so long as there is no period between the temporary perfection and the perfection by registration during which the security interest is unperfected.

Section 24 - Perfection by Possession of Collateral

1. Section 24 provides for the recognition of possession as a method of perfecting security interests in certain types of collateral capable of being reduced to possession.

2. Under the Act, chattel paper is treated as having a physical existence capable of being reduced to possession. In chattel paper financing the document representing the underlying transaction is treated as a form of document of title to rights represented by them. See section 31(5).

3. Section 24(3) creates a legal fiction. It assumes that an uncertificated security has a physical existence when in fact it is nothing more than an entry in the records of a clearing corporation and that a notation in the records that a transfer of the security has occurred is the legal equivalent of a transfer of possession by the debtor to the secured party.

Section 25 - Perfection by Registration

1. Section 25 provides for the perfection of a security interest in any type of collateral by registration of a financing statement containing a description of the collateral. This includes security interests in negotiable collateral such as money or other negotiable instruments.

2. On the surface it might appear unacceptable to allow the perfection by registration of security interests taken in collateral the rights in which pass by negotiation. However, there is nothing in the perfection system of the Act that interferes with negotiability. Indeed, the Act removes any doubt by specifically recognizing the priority of interests acquired through negotiation. See section 31.

3. No conflict exists between the concept of perfection under the Act and the principles of negotiability since perfection whether by registration

or by any other method does not guarantee priority. A security interest in money can be perfected by registration; however, this does not mean that the holder of such a security interest has priority over a transferee of the money. The need to protect the free transferability of negotiable property does not dictate that possession be the only way to perfect a security interest in this type of property. So long as negotiability is not affected by perfection by registration, there can be no objection to its use.

4. It is important to recognize that in some situations, perfection by one method (usually possession by the secured party) is better than another method so far as maintaining perfection of a security interest is concerned. A secured party who has taken a security interest in negotiable property and who wants to be protected against loss of his interest through negotiation of the collateral by the debtor, will perfect his security interest by taking possession of the collateral. However, if the circumstances are such that he has no fear that the debtor will transfer the collateral by negotiation to someone else, but he fears that his interest will be subordinated to a trustee in bankruptcy should the debtor become insolvent, he can use registration as the method of perfection of his security interest.

5. The ability to perfect a security interest in negotiable property by registration can be particularly important where the financing arrangement is of a type that under existing law would be a floating charge on all of the assets of the debtor.

Section 26 - Temporary Perfection

This section provides for temporary perfection where a secured party, who has perfected his security interest by possession, finds it necessary for one of the specified reasons to release collateral to the debtor. While the ability to perfect a security interest in any type of collateral by registration might suggest that there is no need for the temporary perfection provided by section 26, the additional expense involved in registration is not likely to be commercially justifiable in the context of the situations contemplated by section 26 in view of the very short period that the secured party's interest remains undisclosed. In any event, any risk to subsequent good faith transferees of the collateral is removed. See sections 30(5), 31(3) and 31(4).

Section 27 - Perfection Where Goods in Hands of Bailees

1. Section 27 prescribes the five methods available to a secured party for perfection of a security interest in goods in the hands of a bailee such as a commercial warehousing company or a carrier.

2. Section 27(2) makes it clear that the issuance of a document of title to goods does not preclude thereafter the creation of a security interest in goods. However, as a result of section 27(3) a perfected security interest in the negotiable document of title will defeat the subsequent security interest in the goods, even though a financing statement was registered by the holder of the security interest in the goods before the security interest in the document of title was taken or perfected.

Section 28 - Security Interests in Proceeds

1. Section 28(1) provides a basic rule of personal property security law: when a debtor disposes of collateral without the consent of the secured party, a perfected security interest in the collateral is not lost but can be enforced against the collateral in the hands of the transferee unless some special priority rule applies to protect the transferee. However, if the disposition is made with the consent of the secured party, the security interest in the original collateral is lost, but carries over into the proceeds.

2. The system embodied in section 28 for the recognition of security interests in proceeds is designed to facilitate inventory financing under which the original collateral will inevitably be sold by the debtor in the ordinary course of business. The system recognizes that the security interest in the original collateral "extends" to the proceeds with the result that the priority status of the security interest in the original collateral (including the status of a purchase money security interest) extends to the proceeds so long as the requirements of the section as to perfection as to proceeds have been met. See sections 34(1)-(2) and 35(3).

3. Section 28(1) gives to the secured party with an interest in original collateral which has been disposed of by the debtor without authorization, a security interest in the proceeds of the disposition. This is in addition to the security interest in the original collateral that can be asserted against the transferee from the debtor. However, the section does not allow the secured party to claim an enhanced position as a

result of the unauthorized disposition. The secured party can enforce his original and proceeds security interest only to the extent of recovering an amount equal to the value of the original collateral at the date of the disposition. Accordingly, if the original collateral has not depreciated between the date of the disposition and the date the security interest is enforced, the secured party cannot enforce his security interest against the proceeds as well as against the original collateral.

4. A security interest in proceeds must be perfected if it is to avoid subordination to other interests acquired in the proceeds. Section 28(2). The basic approach contained in section 28(2)(a) is that a secured party claiming an interest in proceeds must perfect his security interest in the proceeds just as he would have to do if the proceeds collateral were original collateral. Sections 28(2)(b) and 28(2)(c) state exceptions. If the proceeds are of a kind falling within the original collateral description on the financing statement registered by the secured party, or if the proceeds consist of money, cheques or deposit accounts, there is no need to include on a financing statement a separate description for the proceeds. The assumption underlying these exceptions is that the lack of a separate collateral description for these kinds of proceeds will not mislead persons who rely on information disclosed in search results issued by the registry.

5. Section 28(3) embodies the recognition that it may not always be possible for a secured party to identify at the date he registers his financing statement the kinds of property that the debtor may acquire as proceeds of the original collateral. The secured party is given a 15 day period of temporary perfection during which to register a financing change statement containing a description of proceeds acquired by the debtor.

6. One of the more difficult problems associated with taking and perfecting a security interest in proceeds is the determination as to what constitutes proceeds in a particular case. Under the definition of proceeds contained in section 1 proceeds are "identifiable or traceable personal property in any form and fixtures or crops derived directly or indirectly from any dealing with the collateral". Proceeds are identifiable if they can be directly connected with the original collateral. Traceable proceeds are those that can be earmarked through the use of an appropriate rule of equitable tracing.

Section 29 - Security Interests in Returned or Repossessed Goods

1. This section provides for statutorily created security interests and a set of priority rules for situations in which goods (generally inventory) subject to a security interest are sold or leased by the debtor but are then returned by the buyer or lessee to the debtor or are seized or repossessed. Section 29(1) provides that, although the security interest has been cut off through the operation of section 28(1)(a) or section 30(1)-(3), it reattaches when the goods are returned, seized or repossessed.

2. If the sale or lease has generated an account or chattel paper (or both), the return, seizure or repossession may have an effect on the legal position of a secured party with a security interest in the account or chattel paper. In some situations, the seizure or repossession may result in a loss of the right to collect from the buyer or lessee the amount owing under the account or chattel paper. In other situations, he may still have a right to pursue collection measures against the buyer or lessee, but this may not be worth much in practice. Accordingly, the secured party will want to look to the goods as a source of payment of the obligation owing to him.

A transferee of an account has no contractually created security in the goods, since his security interest is in the account only. Nor does the transferee of chattel paper have a contractually created security interest in the goods. While he has the right to seize the goods under the power contained in the contract that forms part of his chattel paper, he does not have a security interest in the goods themselves. What he has is a security interest in the seller's security interest and the right to collect from the buyer or lessee. See definition of "chattel paper" in section 1.

Section 29(3) gives to a transferee of an account or chattel paper arising out of the sale or lease a security interest in the returned, seized or repossessed goods. Under section 29(4), this deemed security interest is given temporary perfection for a period of 15 days. In order for this perfection to continue beyond this period, the transferee must take steps to perfect the interest as a security interest in goods.

3. Sections 29(5) and 29(6) prescribe the priority rules applicable in cases where the inventory financer, the accounts financer and the transferee of the chattel paper all have perfected security interests in the

returned, seized or repossessed goods. The transferee of the chattel paper has first priority if he acquired the chattel paper in the ordinary course of his business and for new value. This priority is directly related to the priority that he would have under section 31(5) where the inventory financer and the chattel paper transferee both claimed the chattel paper as collateral. In effect, the returned, seized or repossessed goods are treated as a substitute for the chattel paper.

Second priority goes to the inventory financer. Last priority goes to the transferee of the account. This can be explained on the grounds that accounts financers rarely look to returned, seized or repossessed goods as security for loans made to debtors, but generally seek to ensure that they are fully secured through the practice of taking as security accounts which in value exceed the amount owing by their debtors.

4. Section 29(7) removes any possibility of confusion as to the relative priority positions of the holder of a security interest created by the buyer or lessee prior to the return, seizure or repossession of the goods and the holder of a security interest created by this section. Accordingly, an inventory financer cannot assert priority on the grounds that he has registered a financing statement relating to the goods before they were sold by the debtor.

Section 30 - Protection of Buyer or Lessee of Goods

1. Section 30 should be read in conjunction with section 28(1). The latter section contemplates a situation in which the secured party expressly or impliedly consents to the sale or lease of the collateral by the debtor. Section 30 deals with a number of situations in which a buyer or lessee acquires an interest in the collateral in the form of goods under a transaction that may not be authorized by the secured party. In these situations the buyer or lessee takes free of the perfected security interest in the collateral created by the debtor even though the sale or lease is in violation of the security agreement.

2. Section 30(1) gives power to a seller or lessee selling or leasing in the ordinary course of his business to transfer to a buyer or lessee of goods an interest in the goods free from a security interest created by him in the goods. Mere knowledge on the part of the buyer or lessee of the existence of the security interest does not affect his position. The

buyer or lessee acquires his interest subject to the security interest only if he is aware that the sale or lease is in violation of the security agreement.

3. The ordinary course buyer or lessee is protected under section 30(1) only with respect to security interests in the goods given by the seller or lessor or arising by operation of law under sections 28 and 29. If the security interest in competition with the interest of the buyer or lessee was given by someone other than the seller or lessee (such as a prior owner) and the security interest is perfected, the buyer or lessee takes subject to it.

4. Section 30(2) is unlike section 30(1) in four important respects. In the first place it applies to any type of sale or lease and not just to sales or leases in the ordinary course of business. Further, the section applies only to sales and leases of low value consumer goods. Under section 30(2) the buyer or lessee takes free of any security interest in the goods and not, as in section 30(1), just security interests created by the seller or lessor. Finally, in order to get the protection of the section, a buyer or lessee under section 30(2) must acquire his interest without knowledge of the security interest.

5. Section 30(4) is designed to protect buyers or lessees from being deceived by the temporary perfection permitted in the enumerated sections under which a security interest can be perfected without registration of a financing statement relating to it and without the secured party taking possession of the collateral. The section embodies the policy that buyers and lessees should be able to make decisions as to whether or not to buy or lease goods in the hands of debtors on the basis of information disclosed through the registry. They should take free of security interests that are perfected without registration or without the secured parties taking possession of the goods.

6. Section 30(5) deals with that aspect of the registry system under which certain types of goods are described by serial number so as to permit a search for security interests using the serial number of goods as the search criterion. This facility can be very important in any situation where the person who is offering goods for sale or lease is not the person who gave the security interest in the goods (the debtor), but is a transferee of the debtor. A search of the registry using the name of the transferee will not disclose the security interest since it was registered using the debtor's name as the registration criterion. If, however, the searching party can use the serial

number of the goods as the search criterion and the financing statement contains the serial number of the goods, the security interest will be disclosed. It is for this reason that the Act requires that when certain kinds of goods are held by the debtor other than as inventory, a valid registration of a security interest in the goods must include the serial number of the goods. Generally, serial number registration will be required for goods such as motor vehicles, trailers, etc. and other types of goods which have reliable serial numbers. The kinds of goods that fall into this category will be clearly described in the regulations. A security interest in goods, of whatever kind, held by the debtor as inventory can be registered using only the debtor's name as the registration criterion. A security interest in consumer goods, for which there are reliable serial numbers, can be validly registered only by including the serial number of goods on the financing statement. It is in the context of consumer goods such as automobiles that most of the problem unauthorized sales by debtors and transferees from debtors take place.

Section 30(5) is part of a system under which a security interest in goods having reliable serial numbers may be but need not be registered by tendering a financing statement containing the serial number of the goods if the goods are held by the debtor as equipment. In other words, the security interest is validly registered without the registration of the serial number; but the secured party may, if he wishes, include on his financing statement the serial number of the goods taken as collateral. If he does not include the serial number, any buyer mentioned in section 30(5) and any other secured party (see section 35(4)) takes free from his security interest; however, his security interest remains valid as against the debtor's unsecured creditors and trustee in bankruptcy. If the secured party includes the serial number of the goods on his financing statement he gets complete protection against third parties unless, of course, the disposition of the goods by the debtor falls within sections 30(1) or 30(2).

Some secured parties will find that the complete protection available through the inclusion of serial numbers of equipment collateral on financing statements does not justify the inconvenience involved. They will be willing to take the risk that the debtor may dispose of the goods or give another security interest in them in violation of the security agreement. In many cases this risk will be very small. Their primary concern is to ensure that their security interests are valid and enforceable in the event of the debtor's bankruptcy.

By registering a financing statement containing the debtor's name as the only registration criterion, they get this assurance.

7. In certain situations persons acquire ownership of goods under transactions that are technically not contracts for the sale of goods, although the practical effect is the same as if they were. A contract for the supply of services and materials is technically not a sale of goods; nor is a contract under which goods are affixed to land owned by the "buyer". However, in both situations, the "buyer" should have the protection of section 30(1) so long as the transaction involved has been entered into by the "seller" in the ordinary course of his business. Section 30(8) is designed to produce this result.

Accordingly, where a person enters into a contract with a builder to build a house and install a furnace, the owner of the land on which the house is being built takes free of a security interest in the furnace given by the builder even though it is perfected. In this context, the operation of section 30(8) may have an effect on the operation of section 36. If the owner of the land takes free from the furnace supplier's security interest, he has the power to pass to a subsequent buyer or mortgagee of the land an unencumbered interest in the land and furnace.

Section 31 - Protection of Transferees of Negotiable and Quasi-Negotiable Collateral

1. A security interest in negotiable and quasi-negotiable collateral can be perfected by registration under section 25. Consequently, it is necessary to ensure that good faith transferees of this type of collateral are protected from claims to priority asserted by secured parties. Section 31 has this function.

2. Since money is the most negotiable of collateral, a transferee of it acquires title in the actual bills transferred to him. However, merely because he has title to the bills, it does not follow that he is thereby protected from a claim asserted by a person with a perfected security in the money who brings a common law action for money had and received. Section 31(1) makes it clear that such an action cannot succeed against a transferee not for value who takes the money without knowledge of the security interest. Since an unsecured creditor of the debtor would be a transferee for value, a debtor has the power to make cash payments of debts to other creditors even though the money with

which he makes the payment is collateral under a security agreement and even though the creditors are aware of this fact. In this respect, a debtor has the same power to make payments to his unsecured creditors as a debtor has under existing law in a situation in which it has given a floating charge over all of its property.

3. Section 31(2) supplements section 31(1) by giving the debtor the power to pay his debts through the use of a negotiable instrument drawn or made by him. While the section gives priority with respect to the instrument to the transferee of it, the priority does not extend to a deposit account on which the instrument is drawn. Only when the instrument is paid by the drawee can the creditor to whom the instrument is payable be assured that he has priority to the money the instrument represents.

4. Sections 31(3) and (4) guarantee the free transferability of negotiable instruments, securities and negotiable documents of title.

5. Section 31(5) has no counterpart in existing law. It is a central feature of the special system established under the Act for chattel paper. Under the section chattel paper is treated as having a quasi-negotiable character in that the rights it represents can be transferred by a physical transfer of the contract that forms the basis of the chattel paper. While a security interest in chattel paper can be perfected by registration, the secured party who perfects his interest by taking possession of the chattel paper has priority to it, even though he acquires his interest after registration of the competing interest. When the transferee of the chattel paper is in competition with a security interest in the chattel paper as original collateral, he must acquire his interest in the chattel paper without knowledge of the prior security interest. He must also give new value and acquire the chattel paper in the ordinary course of his business. However, when the competing registered security interest in the chattel paper is an interest in it as proceeds of inventory, the transferee need not be without notice of the prior security interest in order to have priority. Accordingly, a debtor who has given a security interest in his inventory and proceeds has the power to transfer to a commercial chattel paper purchaser the proceeds of the inventory in the form of chattel paper even though the transferee is aware of the security interest in the chattel paper as proceeds.

It is important to note that under section 3 a sale of chattel paper as well as a transfer of it for security purposes is regulated by the Act. In fact, the great bulk of chattel paper transfers currently occurring in Canada are sales of the paper to acceptance corporations and banks.

Section 32 - Priority of Liens

This section is an exception to the general rule in section 4(b) that the Act does not apply to liens arising by operation of law or given by statute.

Section 33 - Transfer of Debtor's Rights in Collateral

Since the creation of a security interest does not involve a transfer of title or ownership to the secured party, the debtor remains the owner of the collateral. Section 33 recognizes a debtor's power to dispose of his interest in the collateral and the right of others, such as judgment creditors of the debtor, to have the debtor's interest seized under judgment enforcement measures. While a secured party cannot prevent transfer of the debtor's interest in the collateral, a clause in the security agreement that provides that such a transfer amounts to a breach of contract under the agreement is valid.

Section 34 - Purchase Money Security Interests

1. This section establishes the special priority given to purchase money security interests over prior security interests in the same collateral. The credit grantor holding a purchase money security interest is given this special priority because he provided the credit through which the debtor obtained rights in the collateral. The purchase money priority places into the hands of a debtor the power to get additional credit in the situation where he has given a broadly-based security interest in his existing and future assets. Without this power, there would be a risk that he would be under the control of the secured party who holds the broadly-based security interest.

2. While both sections 34(1) and 34(2) provide for purchase money priority, they set out prerequisites for this priority that are different where the collateral is inventory from what they are when the collateral is other than inventory. In the case of inventory collateral, the secured party must have perfected his security interest at the time the debtor obtains

possession of the collateral and must have given to all secured parties with prior registered security interests in collateral of the kind in which the purchase money security interest is taken notice of the existence or potential existence of a purchase money security interest in inventory coming into the possession of the debtor. The purpose of the notice is to give prior secured parties warning that the new collateral coming into the possession of the debtor is subject to a security interest which would have priority over any future advances made by them to the debtor and secured by the new collateral.

In the case of non-inventory collateral, the secured party has a 15 day "grace period" after the debtor obtains possession of the collateral during which perfection steps can be taken, and is not required to give any notices to holders of prior security interests in the debtor's property.

Section 34(4) deals with a situation in which there are two purchase money security interests in the same collateral. This could occur where the debtor has borrowed part of the purchase price of the collateral from one secured party and has "financed" the balance of the purchase price under a secured installment sales contract with the supplier. Both the lender and the supplier have purchase money security interests in the collateral, and, in the absence of section 34(4), priority would go to the first secured party to perfect his security interest. The section embodies the policy conclusion that the supplier should have priority, if for no other reason than the fact that he has priority under existing law (he has legal title) and to implement a simple first in time rule would be too disruptive to established business practices.

3. Under sections 34(1) and (2) a purchase money security interest in collateral carries over into the proceeds of that collateral with the result that the secured party has a purchase money security interest in the proceeds collateral. If the debtor has given a security interest in his accounts prior to the date that he acquired the purchase money financing and if the proceeds of the sale of the collateral in which the purchase money security interest was taken are accounts, a priority conflict will arise between the accounts financer and the purchase money financer. In the absence of section 34(5) priority would go to the purchase money financer as a result of section 34(1) or 34(2). Section 34(5) gives priority to the accounts financer if he gives new value to the debtor and has registered a financing statement before the purchase money security interest is registered.

The justification for this special priority is the assumption that if priority is given to the purchase money financer, accounts financing will be placed in jeopardy since the accounts financer will have no assurance that he has priority to any of the accounts created by the debtor. All of the debtor's accounts may be proceeds of inventory acquired by the debtor under security agreements providing for purchase money security interests. While the creditor providing purchase money financing loses out to the accounts financer, unlike the accounts financer, he is in a position to assess before he grants credit to the debtor the risk he is undertaking and to take the measures he considers necessary to reduce that risk. This may include attempting to get a subordination agreement from the accounts financer.

4. It is possible to have two purchase money security interests in the same collateral with one being a proceeds interest and the other being a security interest taken in the collateral as original collateral. For example, where goods acquired by the debtor under a purchase money financing arrangement are traded in by the debtor as part of the price of other goods acquired by the debtor under a purchase money financing arrangement, the new goods are proceeds of the old goods since the new goods were acquired by the debtor through a "dealing with" the old goods. See the definition of "proceeds" in section 1. In the absence of section 34(6), priority as to the new goods would go to the first secured party with the proceeds purchase money security interest in the new goods. Section 34(6) reverses this result and gives priority to the secured party holding the non-proceeds purchase money security interest in the new goods.

5. Sections 34(8)-(9) provide a special priority for financers of materials important to agricultural and aquacultural production. Technically, these financers do not have purchase money security interests under sections 34(8)-(9) since their security interests are not taken in the materials being financed. However, their position is very similar to that of a financer who has a purchase money security interest. They are given a special priority because, by financing the supply of in-put materials, they have permitted debtors to produce the agricultural or aquacultural products in which they have taken their security interests.

Section 35 - Residual Priority Rules

1. Section 35(1) states the residual priority rule applicable to any priority dispute for which the Act has not provided a special priority rule.

2. The approach used in section 35(1) is very simple: priority goes to the secured party who is the first to

- (a) register a financing statement (even though at the time of registration he does not have an attached security interest or even a security agreement with the debtor (see section 43(4));
- (b) takes possession of the collateral pursuant to an arrangement with the debtor; or
- (c) has temporary perfection under one of the enumerated sections.

The principle underlying this system is that a third party can always determine the risk associated with dealing with a debtor by finding out from the registry or the person in possession of the collateral if it is in the possession of the secured party, who has or is likely to acquire a security interest in the property of the debtor. The only qualification to the principle is that in some limited situations temporary perfection (without registration or possession by the secured party) is permitted. However, these situations are few and the periods of perfection are short. In any event, temporary perfection affects only those persons who are sophisticated enough to know that they must take into consideration the possibility of a short "grace period" for the perfection by registration or possession by a competing interest. See section 30(4).

3. Note that priority over a prior unperfected security interest in collateral does not depend on acquiring an interest in the collateral or registering a financing statement without knowledge of the prior interest.

4. Under section 35(2) a change in the method of perfection does not displace the priority a security interest had prior to the change. The priority position of a security interest temporarily perfected is not jeopardized by later perfection of the security interest by registration. See also section 23.

5. Since proceeds are treated as an extension of the original collateral, section 35(3) gives to proceeds the priority status of the original collateral so long as the perfection requirements of section 28 have been met.

6. The regulations to the Act will provide that certain types of collateral must be described by serial number on any financing statement used to register a security interest in such collateral. Other types of collateral may, but need not be described by serial number. The value of serial number registration is

described in paragraph 6 of the comment accompanying section 30.

The cumulative effect of sections 30(5)-(6) and section 35(4) is that where a security interest is taken in equipment of a kind that, under the regulations, may be described by serial number on a financing statement, an election by the secured party not to include the serial number makes the security interest vulnerable to subordination by a subsequent buyer of the equipment or another creditor of the debtor who takes a security interest in the equipment and who perfects his interests by registration of a financing statement containing the serial number of the equipment or by taking possession of it. However, the security interest is perfected for the purposes of determining the rights of unsecured creditors of the debtor and the trustee in bankruptcy. If the secured party includes the serial number of the equipment on his financing statement, his security interest is perfected for all purposes.

7. Sections 35(5) and (6) set the priority rules for tacking of future advances. Under section 35(5) future advances can be tacked whether or not the secured party making the future advances is aware of an intervening security interest in the collateral. However, under section 35(6), a secured party cannot tack advances made after he becomes aware of the fact that the collateral has been seized pursuant to judgment enforcement proceedings unless he is obligated under a legally binding commitment to make the advances. The difference between the two situations is that in the case of an intervening security interest, tacking need not create priority problems. The intervening secured party will be aware of the earlier registered security interest and the possibility that future advances will be made to the debtor. If he goes ahead and gives credit to the debtor at this point without getting a subordination agreement from the holder of the prior security interest, he should not be heard to complain about future advances that are tacked.

The situation is quite different where an execution creditor is involved. When he causes the collateral to be seized, he is not in a position like that of the intervening secured party. By this time he has given credit to the debtor; he cannot make a decision not to deal with the debtor. It is unjust and commercially unreasonable to allow the secured party to tack future advances with knowledge of the seizure and thereby "squeeze out" the unsecured creditor. However, if the secured party has legally committed himself to make the advances, he is entitled to tack.

8. Section 35(7) addresses a difficult problem that is associated with any registry system: how to regulate priorities when a registration lapses or is discharged in error or without authorization. Lapse of registration should not be a significant problem under the Act since a secured party will be able to choose the life of his registration.(see section 44(1)) The main concern of the section is with an unauthorized discharge of a registration. There is no way that the registrar can be assured that a discharge of a registration is authorized by the secured party. There are two ways to deal with this problem. One is to treat an unauthorized discharge as void in law. The consequence of this approach is to make the registry an unreliable source of information. The registry will disclose that a discharge has been registered but the searching party will not know whether or not the registration has in law been discharged unless he has this confirmed by the secured party. The other approach (and the one incorporated in the Act) is to treat all discharges tendered to the registry as valid. After discharge of a registration, the secured party is immediately informed and is given 30 days after the lapse or discharge to re-register his security interest without loss of priority to any security interest that, at the time of the discharge, had an inferior priority status. Of course security interests that are registered or perfected during the period between discharge and re-registration are not affected. Where such interests arise, there is a potential for circular priority problems. However, experience in one province that employs this approach indicates that this is not likely to occur with sufficient frequency as to cause concern.

9. The operation of section 35(8) is displayed in the following scenario. Debtor 1 gives to Secured Party 1 a security interest in all of his present and after-acquired widgets. Secured Party 1 perfects his interest by registration. Debtor 2 gives to Secured Party 2 a security interest in a widget that he owns. Secured Party 2 perfects his interest in the widget by registration. Debtor 2 sells his widget to Debtor 1 out of the ordinary course of his business and without the consent of Secured Party 2. Both Secured Party 1 and Secured Party 2 claim priority to the widget sold to Debtor 1. In the absence of section 35(8), a court may conclude that since Secured Party 1 was the first to register a financing statement covering widgets, he has priority under section 35(1).

Section 36 - Security Interests in Fixtures

1. Section 36 reverses the common law by recognizing that a security interest in goods can be maintained after the goods become affixed to realty and that a security interest can be taken in goods after they have become part of real property. However, this does not extend to goods that are building materials as defined in section 1.

2. Section 36(2) is designed to ensure that persons who have or acquire an interest in the realty are not prejudiced by the operation of section 36(1). Such persons are protected by the requirement that the security interest in the goods is registered under the land title system. Accordingly, a subsequent buyer or encumbrancer of the land takes free of the security interest if it is not registered as required. A person who takes an assignment of the interest of a person with an interest in the land at the date the goods are affixed is also protected.

Prior mortgagees who make or contract for advances after the goods are affixed take free from an unregistered security interest in the goods. Further, a prior mortgagee who has obtained a foreclosure or sale order against the land can proceed to treat any fixtures on the land as part of the land unless at the date the order is obtained, the security interest in the fixture is registered.

3. Where the security interest attaches after the goods are affixed to the realty, the consent or waiver of all persons with an interest in the real property is required in order for the security interest in the goods to have priority.

4. Section 36(4) recognizes the real property nature of a security interest in fixtures and requires that it be registered before a judgment against the debtor binds the land to which the goods are affixed.

5. Sections 36(6)-(13) are designed to strike a balance between the rights of the holder of a security interest in the goods who has the right to remove the goods and persons with an interest in the real property from which the goods are to be removed.

Section 37 - Security Interests in Crops

Crops are treated for the purposes of the Act as personal property even though they are still growing and therefore attached to land. See section 1 definition of "crops". This being the case, it is necessary to provide a priority structure that regulates respective rights in crops as personal property and as real property. The system contained in section 37 parallels the system of section 36 since the issues addressed in the two sections are very similar.

Section 38 - Security Interests in Accessions

1. Section 38 does for security interests in "accessions" what section 36 does for security interests in fixtures. It permits the preservation of a security interest in goods after they have become an accession, and it recognizes the ability to take a security interest in goods attached to other goods.

2. This section applies to goods installed in or affixed to other goods. See the definition of "accession" in section 1. It is not confined to goods that under the tests of the common law would be characterized as accessions. On the other hand, the section does not apply where the goods have totally lost their identity such that removal of them from the whole would not be possible; nor does it apply where goods are commingled with other goods to produce an entirely new product. These situations are governed by section 39.

3. While very similar in structure, sections 36 and 38 are not equally efficacious in protecting all persons affected. Since section 38 deals with situations in which the registration of the security interest in the accession must be registered against the name of the debtor and not, as in the case of fixtures, against the property to which the goods are attached, third party protection is much more limited. For example, a person who checks the registry before buying an automobile will obtain a registry search result using the name of the debtor and the serial number of the vehicle. However, if a financer has a security interest in the motor or tires of the vehicle given by someone other than the debtor, this security interest will not be disclosed. Under section 38, however, it will be valid and will have priority over the buyer of the automobile. The same difficulty cannot arise under section 36 since the security interest in the fixture must be registered in the land registry office where it will be discovered by anyone wishing to buy the land to which the goods are affixed.

Section 39 - Security Interests in Processed or Commingled Goods

1. This section provides a set of priority rules under which security interests in goods that are lost

when the goods become totally integrated into a new product or mass are converted into security interests in the product or mass.

2. There will be situations to which the section does not apply because of the type of goods involved and the way in which they are used. Security interests in animal food fed to animals, fertilizers used in crop production, drugs given to animals and so on should not be treated as having survived the loss of separate identity of the collateral. Only in a very general sense can it be said that goods of this kind have become part of the product or mass. Nothing new has been created; something that exists is enhanced. But see section 34(9).

3. Subsections (1) and (2) deal with the situation in which two separate quantities of goods subject to security interests held by separate secured parties are commingled so as to produce a new product. The secured parties lose their security interests in the goods, but are given a pro-rated statutory security interest in the product. Subsection (3) provides an exception under which priority is given to the secured party who has a purchase money security interest in the goods that become part of the product or mass.

4. Subsection (3) also deals with the situation where there are one or more statutory security interests in the product or mass as a result of the operation of subsection (1) in competition with a non-purchase money security interest in the product or mass as original collateral. Priority is given to the holder of a statutory security interest in the product or mass if such holder had a purchase money security interest in the goods that became part of the product or mass and, where inventory is involved, the notice requirements of the section have been met.

5. The section does not state a priority rule to deal with a situation in which a statutory security interest in the product or mass held by a person who had a non-purchase money security interest in goods that became part of the product or mass is in competition with the holder of a non-purchase money security interest in the product or mass as original collateral. Since the statutory security interest in the product or mass is described in subsection (1) as a continuation of the security interest in the goods that became part of the product or mass, and therefore not a separate security interest, priority between two such security interests would be determined in accordance with section 35.

Section 40 - Subordination of Security Interests

1. Subordination agreements play an important role in the context of the Act since the first in time priority rule and the notice registration system give rise to situations in which subsequent secured parties will seek subordination agreements from secured parties who were first to register financing statements.

2. The section makes it clear that a person need not be party to the subordination agreement in order to be able to enforce it so long as such person was an intended beneficiary of the agreement.

3. A subordination agreement may provide for subordination of a security interest to the interests of someone other than another secured party, for example, an unsecured creditor of the common debtor.

4. A subordination agreement can be registered under section 45(6); however, it need not be registered to be effective.

Section 41 - Assignments of Intangibles or Chattel Paper

1. Section 41 prescribes a set of rules applicable to the relationships between an assignor (transferor), an assignee (transferee) and an account debtor in a case where an intangible (usually an account) or chattel paper is assigned or transferred. While some of these rules reflect existing choses in action law of British Columbia, others clarify, extend, and in some respects modify this law. To the extent that the section modifies existing law, it does so in order to facilitate secured financing and commercial dealings involving intangibles and chattel paper.

2. Subsection (2) merely states the rule of equity that an assignee or transferor cannot acquire a better title to an intangible or chattel paper than the assignor or transferor had to give to him. This rule is subject to the existence of an enforceable agreement under which the account debtor agrees that he will not raise against the assignee or transferee the defences and claims he has against the assignor or transferor. Such an agreement is usually in the form of a "cut-off" or "waiver of defence" clause in the original contract between the account debtor and the assignor.

3. Subsection (3) probably states a qualification or modification to existing choses in action law. The purpose of the subsection is to inject an element of practicality into this area of the law by allowing the

assignor or transferor and the account debtor to make minor changes in the contract without the consent of the assignee or transferee. As a matter of public policy, there is no reason why this should not be allowed so long as the position of the assignee or transferee is not affected in a material way and so long as the amendment is commercially reasonable. In any event, to the extent that the modification amounts to a breach of the contract between the assignor or transferor and the assignee or transferee, the latter has his remedy in damages under subsection (4).

4. The underlying thrust of subsection (5) is not novel. The subsection does, however, give somewhat more protection to the account debtor by giving him the right to more precise and accurate information on which to make the assessment as to whether or not the obligation owing by him has been validly assigned or transferred.

5. Subsection (6) is novel. In effect, it prevents an account debtor from barring his creditor from transferring the creditor's property in the obligation. There is very little judicial guidance in Anglo-Canadian case law dealing with the efficacy of anti-assignment clauses. What there is suggests that such clauses are effective. This is so notwithstanding the basic hostility of the common law to restraints on the alienability of personal property.

No doubt the account debtor has a legitimate interest in preventing his creditor from assigning the obligation. After notice of an assignment, an account debtor cannot raise as against the assignee a claim or set-off arising out of any subsequent dealings between the assignor and the account debtor. See subsection (2). The right to raise such a claim or set-off may be important if there is a continuing business relationship between the account debtor and the assignor out of which a claim against the assignor might arise.

Subsection (6) embodies the policy decision that, on balance , the ability of the assignor to transfer his property in the obligation is commercially and socially more important than the right of the account debtor to bar such a transfer. In practical terms, a large and powerful buyer will not be able through the use of an anti-assignment clause in a purchase contract to cut off sources of financing or factoring services that are available only where the seller can assign his chattel paper or accounts to the financer or factor. A similar policy choice was made by the drafter of Article 9 of the Uniform Commercial Code and the Draft Unidroit Convention on International Factoring.

Part 4. Registration

Section 42 - Personal Property Registry

1. A basic feature of the Act is the centralized, computerized notice registry system. While the Act provides for the basic structure of the registry system, most of the details of its operation, including the form of documents to be tendered for registration and the procedural steps involved in registering and conducting searches, will be specified in regulations. See section 78.

2. The Personal Property Registry will displace all existing registries for security interests in personal property. These registries are: the Corporate Registry, the Central Registry, and the Mobile Home Registry. The result of this will be that a secured party shall no longer have to decide in which registry or registries to register notice of a security interest. At present, he must make this decision based upon the type of debtor, whether corporate or individual, and the type of personal property charged, whether motor vehicle, mobile home, or some other form of personal property. Under the Act, notice of security interests in all personal property, regardless of the type of debtor or personal property, shall be registrable in one registry. Similarly, a person conducting a search shall no longer have to decide among the registries.

3. Notice of security interests in rolling stock shall be registrable in the Personal Property Registry rather than the Office of the Provincial Secretary of the province where the purchaser's head office or chief agency in Canada is situate. Notice of transfers of accounts or chattel paper, of leases for terms of more than one year and commercial consignments shall also be registrable in the Personal Property Registry.

4. Provision shall also be made by consequential amendment to the Repairers Lien Act, Tugboat Worker Lien Act and Woodworker Lien Act to allow the registration of notice of liens claimed by repairers, tugboat workers and woodworkers respectively in the Personal Property Registry.

5. There may also be an amendment in the future to the Forest Act to allow the registration in the Personal Property Registry of a notice of a security interest in a timber tenure.

6. S. 42(6) gives specific power to the Registrar to suspend the functioning of the Registry in

circumstances where it is impractical to attempt to continue operations. Such circumstances might involve lack of adequate personnel services, failure of power supply or machinery breakdown.

Section 43 - Registration of Financing Statements

1. This section sets out several key features of the registry system.

2. Date of registration of a financing statement is a very important issue under the priority system of the Act. See e.g. section 35(1). A document is deemed registered under subsection (2) not when it is searchable, but when a date is assigned to it by the registrar. This means that in some situations, a financing statement will be legally registered, but not searchable because it has not yet been entered into the data base of the system. However, this feature of the system should not be a source of difficulties. Every search result will contain on it a currency date indicating the date up to which all registered interests will be disclosed. A credit grantor who wants to guarantee his priority position before granting credit will register his financing statement and then obtain a search result with a currency date after his registration. The search result will disclose his registration and any other prior registrations. Once he is satisfied as to his priority position, he can make the decision as to whether or not to grant credit to the debtor. A prospective buyer will provide in his contract that property will vest in him but that he will not release the purchase price until he has obtained a search result with a currency date later than the date of transfer of the property to him.

3. Each financing statement tendered for registration will be assigned a registration number. This number has several important functions. One of these is to determine priority of registration in cases when two or more financing statements have been given the same registration date. This may well occur because the time intervals assigned to financing statements are sufficiently long that several financing statements could end up with the same registration date. This can create a problem only in the very rare situation where two of such financing statements relate to the same collateral. Subsection (2) provides that in such a case, priority is determined by the sequence of registration numbers.

4. Subsection (4) provides a commercially important innovation to registration of security interests. A secured party (i.e. named as such on a financing statement) may register a financing statement claiming a security interest in property of a person named as debtor even though at the time of the registration, no security agreement has yet been executed providing for such a security interest. This feature displays an important characteristic of the registry system embodied in the Act: it is not necessary to have a financing statement for every security agreement between the same two parties. In effect, a financing statement is merely a notice of the existence or potential for the existence of one or more security agreements providing for one or more security interests in property of the person identified as debtor in the financing statement. See also subsection (5).

The ability to register a financing statement before a security agreement is executed permits a credit grantor to establish his priority position during the negotiation period so as to be in a position to release the money to be loaned as soon as the agreement is executed. This avoids the delays associated with the existing system of registration under which it is necessary to await the execution of the security agreement before taking steps to register the interest. The prudent credit grantor will not release the funds until registration has been completed. During the time it takes to get a valid registration, the borrower cannot draw on the funds and the commercial activity that the funds are to facilitate must be held in abeyance.

There is another by-product of the right to register a financing statement before a security agreement is executed. Under existing law, a secured creditor is sometimes given a "grace period" for registration during which his interest is deemed registered without actually being registered. This injects a great deal of unreliability into the system for third parties who want to rely on the registry to disclose existing security interests. However, when a secured party can register a financing statement before an agreement is executed, there is less need for a "grace period". The result is that the reliability of the registry is enhanced. Accordingly, there are many fewer situations under the Act in which a secured party is given temporary perfection without registration or possession of the collateral. The result is that the registry will be a more reliable source of information to third parties.

5. In the absence of some statutory relief, non-compliance with every detail of the registry requirements of the Act or the regulations would result in an invalid registration. Subsection (6) provides some relief from the strictness of the registration requirements, but not to the extent of destroying the efficacy of the system. A deficiency in a financing statement does not invalidate the registration unless the registration is rendered seriously misleading as a result of the deficiency. It is important to note that what is seriously misleading is influenced by the design of the registry system. The computer program of the system will accommodate certain types of human errors in the preparation of financing statements. For example, a printed search result obtained using the correct name of the debtor as the search criterion may disclose as a close similar match a registration that contains an inaccuracy in the debtor's name. If the circumstances are such that a reasonable person would suspect that the disclosed registration, although against the name of a debtor with a somewhat different spelling, is likely to be referring to the debtor whose name the searching party used as his search criterion, the registration would not be seriously misleading.

6. Subsection (8) makes it quite clear that the test of subsection (6) is objective and not subjective. In other words, it is not important to the issue as to whether or not a deficiency in a registration is seriously misleading that someone has or has not been actually misled. If the deficiency is such as to seriously mislead a reasonable person, the registration is invalid.

7. The regulations will provide that in some situations collateral must be described by serial number. In such situations, there will be two search criteria that can be used for conducting a search of the registry: the collateral serial number and the debtor's name. Subsection (7) makes it clear that in such situations, both criteria, not just one of them, must be recorded on the financing statement in such a way as to be free from defects that are seriously misleading. The result is that, although a searching party may have been able to discover the registration by using the serial number of the collateral, he can assume that, if no registrations are disclosed using the debtor's name as the search criterion, the collateral is free from prior encumbrances.

While in some situations it may appear to be unjust to require both criteria when the registration could have been discovered through the use of one of the criteria, the legitimate expectations of searching parties and the operational integrity of the system require that the two registration-search criteria not be treated as alternatives.

If the two registration-search criteria were viewed as alternatives, several difficulties would be encountered. For example, there will be situations in which it is reasonable for a searching party to use the debtor's name as the only search criterion. He may do so in a situation where he does not have the ability to obtain personally the serial number of the collateral (e.g. heavy equipment) and may not be able to rely on the debtor's ability or willingness to record it accurately. He may also rely on the debtor's name as his search criterion in a situation where he reasonably, but erroneously, assumes that the collateral in the debtor's hands is being held as inventory and, therefore, any prior security interest in it would be registered by use of the debtor's name as the only registration criterion. In such cases, the secured party should be able to proceed on the assumption that if he obtains a search result using the debtor's name as the search criterion, he will discover the existence of any security interest given by the debtor. (He will not discover the existence of a security interest given by someone from whom the debtor obtained the collateral. However, this is a risk he may be prepared to assume.)

Another difficulty with treating the two registration-search criteria as alternatives is that circular priority problems can easily result. For example, if a registration effected by Secured Party 1 does not contain the serial number of the collateral but does contain the debtor's name, the registration would be valid against Secured Party 2, who gave credit to a transferee of the collateral from the debtor. However, if Secured Party 2 registered his security interest using both registration-search criteria, his security interest has priority over Secured Party 3. The result of treating Secured Party 1's registration as valid against Secured Party 2 (because one of the registration-search criteria was used) is that Secured Party 1 has priority over Secured Party 2, Secured Party 2 has priority over Secured Party 3, and Secured Party 3 has priority over Secured Party 1. While circular priority problems of this kind are not without solution, they should be avoided because the solutions rarely meet the expectations of the secured parties when they grant credit.

While the Act requires that both registration-search criteria be used in specified circumstances, it is not complete accuracy that is demanded. Errors in either the debtor's name or in the serial number of collateral invalidate a registration only if they are such as to render the registration seriously misleading. As indicated elsewhere in this commentary, the extent to which an error has any legal significance in this respect will be affected by the computer programme of the registry.

8. The Act provides for the continuation of the perfection of security interests created under prior law. See generally, section 77. An aspect of this system is the requirement that after a specified period of deemed perfection under the Act, the secured party must register a continuation financing statement. This financing statement will indicate the type of security agreement under prior law that is being continued.

Sections 43(10)-(11) address the question as to the validity of a registered continuation statement where the type of security agreement being continued is not indicated on it or is inaccurately identified but the financing statement otherwise complies with the regulations so as not to be seriously misleading. Section 43(10) provides that the validity of the registration of the security interest is not affected by this deficiency. However, anyone who has suffered damage as a result of the failure of the secured party to discharge this obligation, has a right of recovery as provided in section 69.

9. Subsection (13) is one of the measures contained in the Act to prevent abuse of the right given in subsection (4) to register a financing statement before a security agreement is executed. It is also designed to ensure that where a security agreement is executed, the financing statement relating to it accurately reflects the relationship between the parties. Subsection (13) must be read along with sections 49(7) - (13), 50(2)-(11), 69(1)-(2). Generally, these sections provide to a person named as debtor in a registered financing statement a mechanism to have misinformation in the registry deleted or corrected and a right to be compensated in damages for any loss suffered as a result of the misinformation.

Section 44 - Duration of and Amendments to Registrations

1. Section 44(1) provides for variable life registration of financing statements. In other words, within the limits prescribed by the regulations, the registering party is able to specify the period of time he wishes his registration to be effective. This feature of the system displaces the fixed period

registration system of existing law. By giving the registering party the facility to select a period of registration that more accurately reflects the life of the security agreement or ongoing relationship with the debtor, the need to be concerned about renewal of a registration is significantly reduced. Only where the relationship with the debtor extends beyond that originally contemplated will it be necessary for a registering party to be concerned about renewal of a registration.

2. Section 44(2) states, by negative inference, the general rule that a registration cannot be renewed after the expiry of the original registration period. There is an important exception, however, found in section 35(7).

3. While a single financing statement can be used to perfect security interests arising under several security agreements or to cover a number of changes in the terms of a security agreement, this is possible only when the essential information on the financing statement (i.e. name of debtor and description of collateral) is sufficient to encompass the additional security agreements or amended agreements. If it is not, this information can be added to the registration by registering a financing change statement. However, section 44(3) makes it quite clear that an amendment to a registration does not have retroactive effect; it takes effect from the time that the financing change statement is registered. Accordingly, if a new security agreement is entered into or an amendment to an existing agreement is made that provides for a security interest in collateral falling outside the collateral description on the registered financing statement, it is not necessary to register a new financing statement. The existing registration can be amended by registering a financing change statement. However, the priority of the security interest in the new collateral dates from the date of registration of the financing change statement, not the date of registration of the original financing statement.

Section 45 - Registration of Transfers of Security Interests

1. Section 45 deals with situations in which a security interest is transferred in whole or in part by the secured party to a transferee. The purpose of the section is not to prescribe substantive rules dealing with transfers of security interests. Its role is to facilitate the operation of section 18. Accordingly, section 45(4) permits the registration of a financing change statement disclosing a transfer of a security

interest before the transfer takes place. Under section 45(5), when a transfer is disclosed, the transferee becomes the secured party, but only for the purposes of the registration system if the transfer has not actually taken place.

2. It is relevant to note that the registration of a financing change statement disclosing a transfer is not mandatory; the Act does not provide for the invalidity of a registration as a result of the fact that a transfer of the interest is not registered. The reason for this is that the secured party's name is not a registration-search criterion. (Compare section 51 dealing with transfers by the debtor of his interest in the collateral). However, if the identity of the transferee is not disclosed in a registered financing change statement, the transferor is under legal obligation as provided in section 18(6) to disclose it. It is not necessary to have the complete chain of title to the interest disclosed in the registry. If the security interest is transferred before a financing statement relating to it has been registered, it is not necessary to disclose the identity of the transferor. The interest is perfected as against subsequent interests under section 35 so long as the identity of the transferee is indicated on a registered financing statement.

3. While it is not mandatory for a secured party to register a financing change statement disclosing a transfer of his interest, the failure to do so may entail some risks for the transferee. For example, the transferee is estopped under section 18(9) from denying the validity of information provided to any enquiring party under section 18 by a transferor. In addition, the transferee's rights can be adversely affected in situations where notices may be sent to the address of the secured party whose name and address appears on the registry records. For example, the transferee may find his security interest has lapsed without his knowledge under sections 50(4)-(6) where the registrar's notice is sent to the address of the secured party as provided in section 50(5).

4. It is very common under a Personal Property Security Act priority system to have one secured party subordinate his interest to that of another secured party or unsecured creditor of the debtor. Section 45(6) provides for the registration of a financing change statement disclosing the existence of a subordination agreement. However, the section is permissive, not mandatory. Failure to do so does not invalidate the interests of the parties to the subordination agreement.

Section 46 - Registration Documents

This section gives housekeeping powers to the registrar. It gives authority to the registrar to remove from the registry registrations that for the specified reasons should no longer be maintained in the data base of the registry. It should be noted, however, there is no power to remove a registration merely because it does not relate to an extant security agreement unless required to do so under section 50. This feature of the Act is designed to facilitate on-going relationships between a credit grantor and a debtor which may involve periods during which no security agreement exists.

Section 47 - Registration Not Constructive Notice

Section 47 is superfluous to the Act. However, it is included ex abundanti cautela in order to dispel a considerable amount of confusion that has surrounded personal property security registration legislation in Canadian common law jurisdictions. It is important to note that constructive notice plays no role in the priority system of the Act. Some provisions introduce knowledge as an element of priority. See e.g. section 20(c). However, these provisions refer to knowledge as the term is defined in section 1. There are no provisions of the Act that give priority to an interest because the holders of competing interests are deemed to have notice (i.e. constructive notice) of the interest given priority. Priority is based on compliance with the provisions of the Act, not because someone is deemed to have knowledge of the existence of the interest given priority. No doubt, the purpose of registration or possession as methods of perfecting security interests is to provide public disclosure of the existence of the interests. It does not follow from this, however, that registration (or possession) is constructive notice. The registration or possession gives a status. The fact of the status and not deemed notice of it is relevant to the operation of the system.

Section 48 - Registry Searches

1. Section 48(1) provides for the request and issue of search results. While not defined in the Act, it is clear from the section that a "search result" is information communicated to a searching party by the registry pursuant to a request. It may be orally communicated to him or provided in written form as prescribed by the regulations.

2. A request for a search result must specify the search criterion or criteria that the searching party wishes to be used by the registry in conducting a search. The debtor's name is the universal registration-search criterion; it must be provided on every registered financing statement. The search result will disclose registrations recording debtors' names that match exactly the name used as the search criterion. It may also disclose registrations recording debtors' names that are close similar matches to the name used as the search criterion.

3. In some situations (as provided in the regulations), the serial number of goods will be available as a search criterion. A search result will disclose registrations recording serial numbers of collateral that are identical and very similar to that used as the search criterion. Some types of collateral must be described by serial number on the registered financing statement while other collateral may, at the discretion of the registering party, be described by serial number. As to the significance of a decision not to include the optional serial number collateral description, see sections 30(5)-(6), 35(4) and accompanying comments. Serial number registration is particularly valuable when there is a risk that the person who is offering goods for sale or as a security may be a transferee of someone who has given a security interest in the goods. Without the availability of a serial number as a search criterion, the searching party has only the name of the person offering the goods as his search criterion, unless he is aware of the existence of the transferor. A search using the transferee's name will not disclose a security interest in the goods given by the transferor and perfected using his name as the registration criterion.

4. Where a searching party is aware of the registration number allocated to a registration, he may use this number as his search criterion. However, this discloses only the particular registration and amendments thereto but not other security interests registered against the collateral or the debtor's name.

5. Sections 48(2)-(4) are designed to facilitate proof in court of information in the data base of the registry. The onus is shifted to the party asserting that a document and information contained thereon that purports to be issued by the registry is in fact not what it appears to be.

Section 49 - Registration in Land Title Office

1. Since security interests in fixtures and in crops affect real property interests, registration of such security interests under the land title system is necessary. This is provided in sections 36 and 37. Sections 49(1)-(6) and the regulations provide the rules governing such registrations.

2. Sections 49(7)-(11) provide measures to persons affected by such registrations under which misinformation contained in the registrations can be removed. Section 49(9) implements a "notice to lapse" system under which a specified person can force a registering party to make a court application if he is to preserve a registration. For a more detailed discussion of this approach, see comment to section 50.

Section 50 - Amendment or Discharge of Registrations

1. A problem that appears to be endemic to systems for the registration of security interests is the reluctance on the part of secured parties to discharge registrations when the obligations secured have been performed. Failure to discharge a registration may cause inconvenience and, in some cases, loss to the debtor. Accordingly, the registry system of the Act has been designed not only to encourage registering parties to discharge unwarranted registrations but as well to place in the hands of persons named as debtors in registrations power to ensure that information contained in the registry accurately reflects the extent to which their assets are encumbered. Section 50 is one feature of the system designed to accomplish this end.

2. Since the registration system of the Act involves the registration of financing statements and not copies of security agreements, some special measures are required. A feature of a notice registration system of the kind provided for in the Act is that a single notice (financing statement) may be used to perfect several security interests arising under a number of security agreements or amended agreements between the same parties. See section 43(5). In other words, it may reflect an on-going relationship between a secured party and a debtor. In the context of such relationships, it is commercially desirable that the secured party be able to register a financing statement before a security agreement is executed (a feature provided by section 43(4)), and, so long as the debtor is prepared to cooperate, to maintain a registration for periods of time during the relationship when there is no security agreement or no active security agreement between the parties.

3. Section 50(1) provides a statutory obligation for a secured party to discharge a registration relating exclusively to a security interest in consumer goods one month from the date when all obligations under the security agreement providing for the security interest have been performed. The assumption of the section is that where a consumer credit arrangement is involved, there is little likelihood that the parties intend an on-going relationship involving a series of security agreements. The great bulk of consumer credit arrangements are "one shot" transactions. Accordingly, it is important that any registration relating to this type of transaction be discharged when the obligations under it are discharged by the consumer. Failure to discharge the obligation specified in section 50(1) exposes the secured party to an action in damages (including deemed damages in an amount provided by regulation) under section 69(2). The consumer also has the right to have the registration discharged by the registrar under section 50(4)-(6).

4. When a registration relates to a security interest in collateral other than consumer goods there is no statutory obligation on the registering party to discharge or amend a registration so as to ensure that it represents a current relationship between him and the person named as debtor in the registration. However, the person named as debtor is given by section 50(2)-(3) the power to impose this obligation by making a demand that the registration be discharged or amended as the case warrants. Failure to comply with the demand exposes the registering party to an action for damages (including deemed damages in an amount provided by regulation) as provided in section 69(2). Further, the registration can be discharged or amended under sections 50(4)-(6). These protective measures, along with section 43(11) are designed to provide a balance to the very considerable flexibility given to registering parties by the Act. In effect, a person named as debtor in a registration is given the power to control the extent to which a registration against his name or property can be maintained in the absence of an extant security agreement between him and the registering party.

5. Section 50(4)-(6) gives to a person named as debtor in a registration the power to force a registering party to amend his registration so as to reflect the state of affairs between the parties. Failure to do so within the time specified results in the registration being discharged or amended in accordance with the demand made by the person named as debtor in the registration.

The secured party on whom the demand and notice are served can protect his interest by a summary court application under section 50(7). In the hearing the court may make a determination of the rights of the secured party to maintain the registration or may grant an interim order preserving the registration until a further hearing on the merits can be held.

Section 50(8) provides that the lapse system of section 50(4)-(6) does not apply in a situation where the financing statement through which the registration in question was effected indicates that the secured party has a security interest provided for in a trust indenture as defined in section 1. The reason for this exception is that trust indentures usually involve situations in which a trustee is responsible to see that any security interest involved is perfected. In the absence of section 50(8), the failure of the trustee to respond appropriately to a demand could result in a security interest provided for in a trust indenture becoming unperfected with the result that holders of the debt obligations secured by the indenture might suffer loss. While they may have a claim against the trustee, the amount of money involved is likely to be very large and recovery from this source may not be possible.

A person named as debtor under a registration relating to a trust indenture is given the right under section 50(9) to apply to court for an order directing that a registration be amended or discharged in accordance with a demand made under section 50(2).

Section 51 - Transfer of Debtors' Interests in Collateral or Change of Debtors' Names

1. The registry system of the Act can function effectively only if the registration-search criteria are accurate. A problem with accuracy arises in situations where either the collateral is sold and transferred to a third party (who is then in a position to deceive others into thinking that he has unencumbered ownership of it) or where the debtor changes his name. In both situations, the registration-search criterion (i.e. the debtor's name) used in a registration may not be adequate. In order to protect third parties who deal with the transferee of the collateral or the debtor who is then using his new name, it is necessary to ensure that the registration is amended so as to make the name of the transferee or the new name of the debtor, as the case may be, a registration-search criterion.

While the solution to the problem is obvious, it is not easily put into practical application. The problem in this regard is that the obligation to amend the registration so as to indicate the new registration-search criterion must be placed on the registering party. When he is aware of the transfer of the collateral or the change of name of the debtor, no difficulties should result. If he fails to amend his registration so as to have it reflect the transfer or change of name, his registration can fairly be treated as invalid as against interests arising after the transfer of the collateral or change of the debtor's name, as the case may be. However, he may not be aware of the transfer of the collateral or the change of name. It would be commercially unrealistic to expect him to keep such close track of his debtor's affairs as to always be in a position to know of a transfer of the collateral or a change in the debtor's name as soon as it occurs. It is clear that in this circumstance, it is necessary to strike a balance between the need to ensure that accurate registration-search criteria are available to third parties who rely on the registry and what can reasonably be expected of a registering party. Section 51 is designed to strike this balance.

2. Section 51(1) deals with the situation in which the secured party knows of the transfer of the collateral. In fact, he has given prior consent to it. The section gives the secured party 15 days after the transfer has taken place to amend his registration so as to identify the transferee as a debtor and thereby make his name available as a search criterion. Failure to do so results in his security interest being subordinated to an interest, other than a security interest, acquired after the expiry of the 15 day period, to a perfected security interest arising or registered after the expiry of this period and a security interest registered or perfected during the 15 day period if the registration (of the first security interest) is not appropriately amended during the 15 day period. Accordingly, a security interest that was created after the registration of the financing change statement but perfected as a result of a registration occurring after the expiry of the 15 day period and before registration of the financing change statement would have priority. Further, a perfected security interest that was registered or otherwise perfected during the 15 day period has priority if the registration is not amended during the 15 day period.

Failure to register a financing change statement does not, however, affect the priority position of the security interest vis-a-vis a security interest that was registered or otherwise perfected before the transfer of the collateral or the change of the debtor's name. In this respect, the section is consistent with section 35(7).

As a result of the operation of section 30(4), a buyer of goods without knowledge of the security interest takes free from it if he acquires his interest in the goods for value during the 15 day grace period provided in section 50(1).

3. Section 51(2) deals with the situation in which the secured party does not have advance notice of the transfer of the collateral and the situation in which the debtor changes his name. In the case of a transfer of collateral, the 15 day grace period runs from the time that the secured party acquires sufficient information about the transferee so as to permit him to register a properly completed financing change statement. In other words, it is not enough that the secured party is informed that the collateral has been transferred to someone. He must have the name and address of the transferee before he is in a position to complete a financing change statement indicating the transferee as a debtor. Failure to act timeously in accordance with the section renders the security interest vulnerable to subordination to the extent described in the preceding paragraph. Here again, as a result of the operation of section 30(4), a buyer of goods who gives value without knowledge of the security interest, takes free from it if he acquires his interest during the 15 day grace period.

4. Section 51(3) states a special exception for registrations effected under pre-Act law that through the operation of section 77 are continued effective after the Act comes into effect. The reason for this exception is that these registrations will not be represented by a financing statement. Accordingly, there will be no record in the registry to amend to display a transfer of collateral or a change of name.

5. Section 51(4) deals with a situation in which there have been two or more transfers of the collateral without the consent of the secured party, and the secured party then learns the identity of the transferee in possession. In such a situation the secured party is excused from registering financing change statements that disclose the entire chain of transactions from the original debtor to the transferee in possession.

Section 52 - Recovery of Loss Caused by Error in Registry

1. A feature of any registry system containing information on which important commercial decisions are made is reliability. Experience in jurisdictions that have computerized notice registration systems functioning in the context of a Personal Property Security Act have demonstrated a very low incidence of administrative error in information entered into the data bases of the systems. There is no reason to expect that the experience in British Columbia will be different. The principle reason for this is that the computer programmes used for such systems can be designed with a series of error identification measures that permit the elimination of most errors before registration information is entered into the data bases of the systems. However, errors do occur and users of such systems should not be expected to bear the entire cost of such errors should they result in loss. It is for this reason that section 52 provides for the recovery of loss or damage suffered by a person who has relied on a search result that is incorrect because of an error or omission in the operation of the registry.

2. It is important to note that the registry is not a guarantor of the information contained in the system. The registrar has no control over the substance of information contained in financing statements. The protection provided by section 52 relates only to errors or omissions in the operation of the registry. Fraudulent conduct on the part of someone who registers a financing statement or financing change statement does not provide a ground for recovery from the registrar even though that conduct has caused incorrect information to be included in the registry and someone has relied on that information.

3. Section 52(2) provides a limitation period during which an action against the registrar must be brought. The absolute cut-off after six years is necessary in order to give the registrar clear guidance as to when he may destroy records of search results.

4. Section 52(3) limits recovery to persons who have requested from the registry the search result that was the source of the problem. This is an understandable limitation. It is clear that in a direct or indirect way the cost of providing the insurance against errors or omissions in the system must be carried by the users of the system through the payment of fees. It follows that those who have paid for the service should be the ones to benefit from it. Search results obtained by agents, such as solicitors, fall within the scope of the guarantee of accuracy provided by the section.

Section 53 - Recovery of Loss Where Trust Deeds Involved

1. A trust indenture involves a single secured creditor, the trustee, but a number of holders of the obligations of the debtor. Loss suffered as a result of an error or omission in the operation of the registry will be experienced by obligation holders and not the trustee. Accordingly, section 53 provides for a class action to be brought by the trustee on behalf of all obligation holders. While reliance on a search result containing erroneous information is an element of an action for recovery, it is not necessary for the obligation holders to establish personal reliance. It is sufficient that the trustee has relied on the search result.

2. Section 53 has another important function. Because of the great difficulty in making an accurate assessment of the potential liability of the registrar, limits will be placed on the amount of recovery available to claimants. Power to establish such limits is found in section 54. In the case of a trust indenture, a single defective search result is likely to be involved (for which a nominal fee has been paid) but there is potential for loss being suffered by a large number of obligation holders. It is not reasonable to treat all of the obligation holders cumulatively as a single claimant for the purposes of the limits on recovery, nor is it reasonable to treat each obligation holder as a separate claimant. The *via media* adopted is to set a higher recovery limit where a class action is involved, but to require that this amount be shared by the obligation holders. Section 53 provides the mechanism for handling the recovery and distribution of the amount recovered where a class action is involved.

Section 54 - Payment of Claim for Loss

1. This section provides for a limitation on the amount recoverable by claimants under sections 52 and 53. For further comment on the limitations, see comment 2 accompanying section 53.

2. Under section 54(2) the Crown is subrogated to the rights of a claimant who has recovered from the Crown. However, this right of subrogation cannot be exercised in such a way as to prevent the claimant from recovering from a debtor the difference between his loss and the amount recovered from the Crown.

Part 5. Rights and Remedies on Default

Section 55 - Default Rights and Remedies: General Provisions

1. This Part of the Act prescribes the regime within which security agreements must be enforced. Section 55(1) makes it clear that the Part does not apply to the deemed security interests enumerated in section 3. These interests do not secure payment or performance of an obligation and are not in substance security agreements. Accordingly, if a lessee under a true lease for a term of more than one year defaults under the lease, the lessor's rights and remedies are regulated by the common law rules applicable to the breach of a lease agreement.

2. Section 55(3) excludes from the operation of this Part transactions between a pledgor and a pawnbroker. The reason for this exclusion is that the system of Part 5 has not been designed to accommodate pawn transactions under which the amount of the money loaned and the value of the collateral are usually small. It is quite unrealistic to require pawnbrokers to meet the stringent and extensive requirements of a system designed to regulate sophisticated secured transactions in which the amount of credit involved and the value of the collateral are generally large. The section embodies the recognition that pawn transactions are specialized types of consumer credit contracts that require a sui generis system for the regulation of default rights and remedies.

It should be noted, however, that pawn transactions are excluded only from the scope of Part 5 and not from the remainder of the Act, including section 17.

3. Part 5 contains extensive provisions dealing with receiverships. Some of these provisions apply only to receivers, some apply to receivers and receiver-managers while others apply only to receiver-managers. The context of each section provides guidance as to its scope in this regard. Section 55(4) is designed to avoid cumbersome repetition of the terms receiver and receiver-manager in Part 5.

4. Section 55(5) prescribes a general standard of conduct that underlies all of the rights and obligations contained in a security agreement and set out in Part 5. Accordingly, it is not enough to comply with the strict wording of a security agreement or of a provision in Part 5. There is an additional obligation on the parties to a security agreement to exercise contractual and statutory rights and obligations in good faith and in a commercially reasonable manner.

The Act does not define either concept. However, they are concepts well known to the business community and ones within which most people conduct business relations. The concepts are not necessarily uniform or immutable. They are conditioned by the established practices in particular segments of the business community and are reshaped by changing circumstances.

5. Section 55(6) is designed to facilitate the exercise of secured creditors' rights in cases where a single obligation is secured by a security interest in both real and personal property. The section permits a foreclosure order or an order for sale of real property to include as well personal property that also secures the obligation. This can be an important feature in a case where to proceed against the land or personal property separately would result in the extinguishment of the obligation.

Section 56 - Limitations on Waiver of Rights

1. Section 56 has the effect of making Part 5 a "code" of enforcement rules that can be modified very little. The policy underlying the approach embodied in Part 5 is that personal property security legislation should provide a fair balance between the needs of credit grantors and the interest that defaulting debtors and other persons have in protecting what might be a very significant investment in collateral. While detailed and broad in scope, the systems prescribed in Part 5 are not unrealistic or rigid. If, in particular cases, application of the code would produce injustice, a court is given wide powers under section 63, *inter alia*, to relieve a party from compliance with the requirements of the Part.

Section 57 - Collection of Payments Under Intangibles or Chattel Paper

This section describes the realization steps available to a secured party where the collateral is of a nature that seizure and liquidation is not possible. Realization involves collecting from the person obligated to pay as provided in the collateral. This section dovetails with section 41.

Section 58 - Right of Seizure or Repossession

1. Section 58(1)(a) states a rule fundamental to all transactions providing for non-possessory security

interests in tangible personal property: upon default, the secured party has the right to seize (in the case of a secured loan transaction) or to repossess (in the case of a secured credit sales transaction) the collateral. Since the Act provides for such a right, there is no need, as there is under present law, to provide for a right of seizure or repossession in the security agreement.

There are, however, implicit limitations on the secured party's seizure or repossession rights. He can seize or repossess only by a method permitted by law. Further, the section should not be read as indicative of a legislative intent to give the secured party the right to seize or repossess collateral in circumstances where a breach of the peace, trespass or assault might occur.

Another limitation that may well be read into the section is the principle established by the Supreme Court of Canada in Lister v. Dunlop [1982] 1 S.C.R. 276. While the Act defines "default" in section 1 as meaning the failure to pay the obligation secured when due, and even though section 58(1)(a) appears to give an immediate right of seizure or repossession in the event of "default", it may be that, at least in a case where a demand obligation is involved, seizure amounts to a conversion of the collateral by the secured party if it is effected without giving to the debtor a reasonable period of time to meet the demand. The same principle may also apply where the security agreement provides for installment payments and the secured party elects to accelerate the obligation by relying on an acceleration clause in the security agreement.

2. Sections 58(1)(b) and (1)(c) facilitate the handling of seized or repossessed collateral which is of a kind that cannot easily be taken into actual physical possession by the secured party. A form of constructive seizure and repossession is permitted, so long as the security interest in the collateral is perfected by registration. This section must be read along with section 17 which regulates the rights of the secured party and the debtor when the secured party is in possession either before default or after default and repossession or seizure. Since the secured party who proceeds under section 58(1)(b) is deemed to have taken possession of the goods, he has the rights and is subject to the obligations of a secured party in possession as provided by section 17.

3. Section 58(1)(d) recognizes that the value of a security interest in a document of title is the value of the goods described in the document. Accordingly,

there will be situations in which the secured party may find it advantageous or necessary to tender the document of title to the custodian, take possession of the goods and proceed to enforce his security interest in the goods.

4. Sections 58(2)-(4) incorporate into the Personal Property Security Act the policy contained in section 23 of the Sale of Goods on Condition Act and section 26 of the Chattel Mortgage Act. It should be noted, however, that the test of application specified in section 58(2) is quite different from that of the existing legislation. The limitation prescribed by the section applies only where at the date the security agreement is executed, the goods taken as collateral are being acquired or are held as consumer goods. Under current legislation, the limitation prima facie applied to all security agreements (conditional sales contracts and chattel mortgages), but can be waived by a corporation. It is clear that sections 58(2)-(4) are narrower in scope than the legislation they will replace.

One implication of this is that the consumer protection provisions will no longer apply to comercial purchases by unincorporated businesses. While this eliminates protection currently available to unincorporated business, in so doing it may make it less difficult for such businesses to secure financing.

Section 59 - Regulation of Disposition of Collateral

1. Section 59(1) has three functions:
   - (a) it provides a statutory right of disposition of the collateral;
   - (b) it provides a rule dealing with the secured party's rights and obligations with respect to putting the collateral in condition for sale; and
   - (c) it provides inferentially a statutory security interest in the collateral to secure the reasonable costs of seizure or repossession of the collateral, of putting it in condition for sale and of disposing of it.

2. Section 59(1) gives to the secured party a right to decide either to dispose of the collateral in the condition in which it is seized or to incur expenditures to repair, process or otherwise prepare the collateral for disposition. However, this is not a totally unfettered right. Section 55(5) provides that the rights provided in Part 5 (including section 59) must be exercised in good faith and in a commercially reasonable manner. Accordingly, the decision to make

or not to make the additional expenditures must pass the test of commercial reasonableness.

3. Sections 59(2)-(11), (15) are designed to provide a balance between the secured party's need for flexibility in disposing of the collateral and the rights of the debtor (or other persons with interests in the collateral) to take measures available to him to protect his interest.

The secured party is given considerable freedom with respect to:

- (a) the manner of disposition of the collateral (section 59(2));
- (b) the right to purchase the collateral (section 59(11)); and
- (c) the right to be excused from unreasonable compliance with notice requirements (section 59(15)). In addition, a court, on the motion of a secured party, may give directions with respect to compliance with the requirements of the section and relieve the secured party from compliance with the section. See section 63.

The interests of the debtor or other persons with interests in the collateral are protected by the pre-disposition notice requirements of sections 59(4) - (10). Elsewhere in the Part, (see section 62) the debtor and other persons with interests in the collateral are given rights of redemption and the debtor is given a right of reinstatement. The underlying policy of sections 59(4) - (10) is that these rights are not of much value unless persons to whom they are given are informed that they are available. While one can reasonably expect that large corporate debtors which always act with expert legal advice do not need the protection of these sections, it is unreasonable to expect that the much greater number of small business and consumer debtors will have the legal sophistication to know the existence or details of their statutory rights to take measures to protect their interests in the collateral. The practice of including in security agreements a plethora of "boiler plate" clauses dealing with (and at times misrepresenting) creditors' rights and debtors' obligations after default, makes sections 59(4) - (10), all the more important to a public policy of full and accurate disclosure of legal rights and obligations.

4. Section 59(9) provides for less detailed notices in cases where a receivership is being used as the method through which a security interest is being enforced.

5. Section 59(12) is based on the conclusion that if third parties who purchase property from a secured creditor in a disposition sale, for value and in good faith, need not be concerned about whether or not the procedural requirements of the Act have been met, and whether or not subsequent interests have been cut off by the sale, they will be willing to pay more for the property than otherwise would be the case. The result is that collateral is more likely to be sold for its market value rather than the heavily discounted price so often recovered in sales of seized or repossessed collateral.

Since prior security interests deemed but, in fact not, registered under section 77 will not necessarily receive notice of a sale because there are no registered financing statements indicating the existence of their interests, they are exempted from the cut-off effect of section 59(12). This will be a temporary problem since such interests will be deemed registered for a limited period of time after the Act comes into effect.

Section 60 - Distribution of Amounts Realized From Disposition of Collateral

1. A fundamental feature of any system for the recognition and enforcement of security interests in property is that the secured party is entitled to retain only a sufficient amount from a disposition of the collateral to discharge the debt owing to him and the costs of disposition. Any surplus over this amount belongs to the debtor or other persons with interests in the collateral if the interests of such persons are cut off by the disposition that produced the surplus. Section 60(1) codifies this feature.

The order of distribution described by the section is, however, *prima facie* only. In other words, the section does not establish priority rights nor does it excuse the secured party from taking the necessary measures to ensure that established priority rights to the surplus are recognized. See also section 60(3).

2. Section 60(2) gives to the persons likely to have an interest in an actual surplus or a surplus that would have existed had the disposition been properly carried out, a right to a statement from the secured party that discloses information important in an assessment as to the propriety and adequacy of a disposition of collateral and distribution of a surplus.

3. Another fundamental feature of a secured transaction is that if the amount realized from a disposition of the collateral is inadequate to discharge the obligation secured, the debtor remains indebted to the secured party for the difference between the amount of the obligation and the amount recovered in the disposition of the collateral: the deficiency. Section 60(4) codifies this feature. However, the section defers to any contractual provision or other applicable law, including section 67, which may preclude a right to a deficiency.

Section 61 - Voluntary Foreclosure

1. Foreclosure of a debtor's interest by court order or by agreement of the debtor is a common feature of secured transactions law. In recognition of this, section 61 provides a procedure through which this can be accomplished in such a way as to ensure fairness and the recognition of the interests of all persons who would be directly affected by a foreclosure. While a court sanctioned foreclosure is contemplated by section 61(6) in limited circumstances, the primary focus of the section is on non-judicial foreclosure carried out with the consent or acquiescence of all persons affected. The system prescribed by the section applies to all types of security agreements, but, for obvious reasons is inapplicable where enforcement proceedings are in the hands of a receiver. See section 1, definition of "secured party".

2. The system contemplated by section 61 is initiated by a proposal of the secured party to accept the collateral in full satisfaction of the obligation secured by it. The system does not apply to a situation in which the secured party proposes to accept some of the collateral in satisfaction of some of the obligation. A separate contractual arrangement outside the Act would be required in such a case.

Section 61(3) permits foreclosure through acquiescence. In other words the failure of objection on the part of the persons entitled to object and who have been given notice of the secured creditor's proposal, results in the automatic foreclosure of the debtor's and all subordinate interests in the collateral.

3. Section 61(6) recognizes that in some cases objections to a secured party's proposal may be made for frivolous or vexatious purposes. When this can be established, a court has the power to rule that an objection is not effective to block the secured party's foreclosure proposal.

4. Consistent with the approach taken in section 59(12) in cases of disposition of collateral by a secured party, section 61(7) provides that a purchaser of collateral in the hands of the secured party takes free from subordinate interests in the collateral.

Section 62 - Rights of Redemption and Reinstatement

1. The essence of a modern secured transaction is that the secured party acquires an interest in the debtor's property to secure an obligation. In other words, the property in the collateral is in the debtor; the secured party has a security interest in the collateral taken to secure an obligation. It is a logical extension of this that, until the debtor's ownership in the collateral is extinguished by legally sanctioned disposition of the collateral or the foreclosure of the debtor's interest in it, the debtor must be entitled to discharge the security interest and regain full unencumbered rights to his property. Section 62(1)(a) recognizes this right. It retains the terminology of the courts of equity by describing the debtor's right as a right to "redeem the collateral". This right is exercisable by tendering performance of the obligation secured by the security interest along with an amount sufficient to compensate the secured party for permissible costs incurred in any enforcement measures undertaken by him.

2. Consistent with the basic concepts of secured transactions law, section 62(1)(a) gives to persons other than the debtor the right to "redeem" the collateral.

3. An almost universal feature of security agreements that provide for installment performance of the obligation secured is a provision giving to the secured party the right to elect to accelerate the obligation (i.e. advance the payment obligations) under prescribed circumstances. These clauses have an important and legitimate function and are only minimally regulated by the Act. See section 16. However, it has long been recognized that such clauses have the potential for producing unfairness to defaulting debtors and may permit commercially unjustifiable action by a secured party. Sections 62(1)(b) and 62(2) are designed to provide some balance between the needs of secured creditors to have the right to accelerate performance in the event of default by debtors and the protection of debtors from misuse or abuse of the right to accelerate. The effect of section 62(1)(b) is to give to a debtor in default the opportunity to correct his

default and thereby "reinstate" the agreement and avoid the effects of an acceleration clause. However, it is clear that a right of reinstatement can be abused. A secured party should not be required to accept reinstatement when the debtor is consistently in default. Frequent default may be the product of carelessness or may be evidence of pending insolvency of the debtor. It is for this reason that section 62(2) places a limit on the number of times that a debtor is entitled to reinstate an agreement.

It is relevant to note that the right of reinstatement is given only to a debtor and, in any event, is not available when a receivership is being used as the method through which the security interest is being enforced. See section 1, definition of "secured party".

Section 63 - Supervisory Jurisdiction of Court

Part 5 provides a system for the regulation of the rights and remedies of secured creditors and defaulting debtors that is designed to be complete and balanced. However, the art of the draftsperson is not such as to permit the writing of statutory provisions that will produce justice and commercially reasonable results in all cases. It is clear that a system as broad and detailed as that contained in Part 5 must have built into it a mechanism through which flexibility can be introduced. Section 63 has this function.

Essentially section 63 provides for ad hoc judicial supervision over the exercise of the rights and remedies provided in Part 5 and the other enforcement provisions of the Act. This supervision goes well beyond judicial interpretation of the provisions of the Act; it permits a court to relieve from compliance with its provisions or to stay the exercise of rights of the parties to a security agreement.

There may be those who draw back from giving to courts broad discretionary jurisdiction to supervise the exercise of rights and remedies given by the Act. While the concept has rarely been as explicitly and as broadly stated as it is in section 63, it is certainly not foreign to Anglo-Canadian legal traditions. The supervisory power of courts of equity underlies the equitable principles that have played a central role in the development of modern systems of secured financing.

Section 64 - Appointment and Qualifications of Receivers

1. The use of receiverships as a method of realizing on security interests in collateral is very common. Since the Personal Property Security Act has been designed to bring together all significant legislative provisions dealing with security interests in personal property and the enforcement of such security interests, it follows that existing statutory law dealing with receiverships where the collateral involved is personal property should be incorporated into the Act. This has been done. However, the provisions of the Act dealing with receiverships address only the essential features of a receivership. Much is left to established case law.

The consolidation of legislation dealing with receivership will result in the transfer of provisions from the Company Act to the Personal Property Security Act. Provisions dealing with receiverships where the collateral involves real property will remain in the Company Act.

2. The need to transfer provisions from the Company Act to the Personal Property Security Act provided a convenient opportunity to reconsider some of these provisions in the light of developments in this area of the law both in British Columbia and in other jurisdictions. This reconsideration led to some changes.

The most important of these changes relate to sections 112, 113 and 115 of the Company Act. The effect of these sections is to make the receiver an officer of the debtor corporation and to impose upon him fiduciary obligations to the debtor. In addition, section 112 expressly provides that the receiver is not the agent of the person who appointed him or on whose behalf he was appointed. These sections were apparently designed to deal with two issues:
(a) the standard of care that a receiver must exercise when dealing with the debtors assets; and
(b) the extent to which the secured party who has appointed the receiver is liable to others (including the debtor, subordinate secured creditors, and unsecured creditors) for the misconduct and mismanagement of the receiver.

It is unnecessary and potentially confusing to define the receiver's standard of care toward the corporation as that of an officer or as a fiduciary. If the goal is to provide a statutory standard of care for a receiver, it is preferable to prescribe that standard directly rather than indirectly by analogy to someone who is not in the position of a receiver. This is the approach taken in the Canada Business Corporations Act (section 94). Under the federal legislation, the standards are good faith and commercial reasonableness.

There are two significant difficulties associated with treating the receiver as an officer and fiduciary of the debtor corporation. The first difficulty is that an officer of a corporation is a manager of the entire legal entity; at common law a receiver is a manager of the collateral to which the security interest attached. As an officer of the corporate debtor, the receiver has all of the obligations of a person in this capacity which include, *inter alia* the duty to account to the shareholders. It is relevant to note that in 1979 section 94 of the Canada Business Corporations Act was amended so as to drop the analogy to an officer of the debtor corporation (who at common law and under statute has a fiduciary obligation to the corporation) in favour of a *sui generis* statutory standard for receivers.

The second difficulty is that, for the most part, a receiver does not act on behalf of the debtor, but acts on behalf of the secured party who appointed him. He cannot have two masters. This feature of the receiver's position is recognized in section 108 of the Company Act: "...and realize the security of those on whose behalf he is appointed,...". It is also well established in the case law in both Canada and the United Kingdom that a receiver's primary duty is to realize against the security on behalf of the secured party who appointed him. See *Re B. Johnson & Company (Builders) Ltd.* [1955] 1 Ch. 634, at 661; *Ostrander v. Niagara Helicopters Ltd.* [1974], 1 O.R. (2d) 281 (H.C.). In the *Ostrander* case, Mr. Justice Stark described the role of a receiver (appointed under the provisions of a security agreement that named the receiver as agent of the debtor corporation) in the following terms at page 286:

> His role was that of agent for a mortgagee in possession. The purpose of his employment was to protect the security of the bond holder. Subsequently his duty was to sell the assets and realize the proceeds for the benefit of the mortgagee. Of course he owed a duty to account in due course to the mortgagor for any surplus;... Certainly he owed a duty to everyone to act in good faith and without fraud. But this is not to say that his relations to Ostrander or to Niagara or to both were fiduciary in nature"

This formulation of the position of a receiver has been generally accepted by courts throughout Canada.

Section 112 of the Company Act contains the express declaration that the receiver is "not an agent of the persons by, or on whose behalf, he is appointed...". This seems to be an attempt to codify what on the surface would appear to be the law in cases where a security agreement provides, as such agreements almost always do, that a receiver is the agent of the debtor. The historic reason for including such clauses was to ensure that the secured party who appointed the receiver was not held responsible for any misconduct on the part of the receiver. An agency clause is also considered by some as being the appropriate vehicle through which to give to the receiver the power to take over and, perhaps, carry on the business of the debtor. In the context of current British Columbia law, the clause is unnecessary for this purpose since section 109 of the Company Act gives express power to a receiver-manager to carry on the business of the debtor corporation.

The obvious anomaly associated with the practice of including an agency clause in a security agreement is that the receiver is appointed agent of the debtor in a document dictated by the secured party with the full understanding and judicial recognition that the receiver, for all important purposes, is the agent of the secured party. This conceptual difficulty is addressed in the Company Act by section 115 which allows a receiver to make application to a court "to be relieved from his fiduciary relationship (to the debtor) so that he may give special consideration to the interest of the person by or on whose behalf he is appointed...". In practical terms this means that in order to be acting within the law, every document appointed receiver in British Columbia must make such an application.

The law relative to this area is in the process of clarification. It is relevant to note that there is no express reference to agency clauses in the Canada Business Corporation Act and similar legislation in other Canadian jurisdictions. The parties are free to put such a clause in their agreement if they so choose although the consequences of so doing are not always what the secured party had in mind. See Peat Marwick Ltd. v. Consumers Gas Co. (1981), 113 D.L.R. (3d) 754. What is made clear in the Canada Business Corporations Act (section 95(d)) and similar legislation of other jurisdictions is that a secured party cannot necessarily escape liability for the misconduct of his appointee to the extent that the requirements of the Act have not been met. By contrast, section 116 of the Company Act which makes no reference to the power of a court to make the secured party liable for the misconduct or mismanagement of the receiver he appoints.

3. The Personal Property Security Act brings the provincial law of British Columbia much more in line with federal law applicable to the province and the law of other common law jurisdictions in Canada. The Personal Property Security Act prescribes a clear set of rules (Part 5 generally) and a statutory standard (section 55(5)) governing the conduct of a receiver who is proceeding to realize on security. The net effect of these rules is not to place the receiver in the position of a fiduciary vis-a-vis the debtor. The effect is to place him in the same position as that occupied by all other secured creditors or representatives of secured creditors. For further discussion of this point, see comment to section 66 infra.

Further, while not prohibiting the use of agency clauses, the Act (section 66(1)(e)) makes it quite clear that an agency clause will not protect a secured party from the consequences of misconduct or mismanagement on the part of a receiver he appoints. While liability is not automatic (as it would be if the receiver were treated for all purposes as an agent of the secured party) a court is given the power to make the secured party accountable for such consequences.

4. Section 64 is the counterpart of sections 109, 122 and 123 of the Company Act. Subsection (4) makes it clear that the actions of an unqualified person appointed as a receiver are not invalid. This is an important measure for the protection of persons who deal with a person acting as a receiver without knowledge of his lack of qualifications.

Section 65 - Reporting and Disclosure Obligations of Receivers

1. Section 65(1) is, with minor modifications, the equivalent of sections 108, 117 and 120 of the Company Act. However, section 117(g) has not been transferred to the Personal Property Security Act with the result that the summaries prepared by the receiver will continue to be filed with the Registrar of Companies.

2. Section 65(2) is the counterpart of section 117(h) of the Company Act. The section is designed to provide a degree of private policing of the activities of a

receiver by the persons whose interests would most likely be the ones adversely affected by misconduct on the part of the receiver.

Section 66 - Court Supervision of Receiverships

1. Section 66(1) recognizes the inherent equitable jurisdiction of a court to appoint and control receivers and gives to the court the same degree of supervisory power over document appointed receivers that it has over court appointed receivers. In addition, the court has the power to override an "agency" clause or any other clause in a security agreement under which the secured party seeks protection from the misconduct of the receiver he has appointed.

2. Section 66(2) is an important aspect of the approach taken to the regulation of receiverships under the *Personal Property Security Act*. This approach proceeds from the position that a receiver is acting for the secured party who appointed him. Accordingly, for the purposes of Part 5 a receiver is the *alter ego* of the secured party. Section 1 of the Act defines the term "secured party" to include "receiver" (and also where appropriate, "receiver-managers (see section 55(5)) in sections 17, 55, 57, 58, 59(1), (3), (12), and (15), 60, 62(1)(a), 63 and 69. In other words, except to the extent that there are special rules applicable to receivers (see e.g. sections 59(8) and (9)) or a provision exempting receivers from the scope of specific rules of Part 5, a receiver is subject to the same regulatory regime as is applicable to secured parties who have not proceeded to enforce their security interests through receivership.

Section 66(2) excepts receiverships from the operation of sections 59 and 60 when the receiver is dealing with the collateral as part of carrying on the business of the debtor. The section recognizes that in this context a receiver must be given greater freedom than is allowed by sections 59 and 60. However, his conduct remains subject to the standards prescribed by section 55(5).

3. Section 66(3) makes it clear that the inherent jurisdiction that a court of equity has over court appointed receivers is not affected by the Act.

Section 67 - Rights and Remedies: Consumer Goods

1. This section embodies the policies contained in sections 23 and 24 of the Chattel Mortgage Act and sections 19, 20 and 22 of the Sale of Goods on Condition Act.

2. One important change has been made. Under existing legislation, the limitation on cumulative exercise of remedies applies *prima facie* to all conditional sales contracts and mortgages (other than corporate debentures). However, a corporate debtor may waive the statutory protection. Under section 67(1) the limitation applies only where the security interest being enforced is taken in goods that at the time the security agreement was executed were being acquired or held by the debtor as consumer goods.

3. Under section 67(1) the secured party must make an election with respect to the remedies available to him. He may choose to bring action to recover a judgment against the debtor for the amount of the unpaid debt or other unperformed obligation under the security agreement. Alternatively, he may choose to enforce his security interest in the collateral by seizure or repossession, proceedings under section 55(5) (where real property is part of his collateral), taking the goods in full satisfaction of the obligation secured as provided in section 61 or accepting surrender of the goods by the debtor.

4. An election to proceed against the collateral results in the extinguishment of the obligations of the debtor under the security agreement or any related agreement pertaining to the security agreement. It also results in the release of a guarantor of the debtor's obligations and the release of any indemnitor who has undertaken to ensure performance of those obligations.

5. Under existing laws, where a secured party has a security interest in land and goods to secure the same obligation, seizure of the goods extinguishes the obligation and thereby automatically releases the security interest in the real property. Further, it has been held that an order for foreclosure absolute of the real property that involves a judgment against the debtor extinguishes the obligation and therefore affects the secured party's right to enforce thereafter his security interest in the goods. This latter feature of existing law has not been carried over into section 67. See section 67(3).

6. Section 67(4) permits a secured party to seize some of his collateral without extinguishing the entire obligation of the debtor. However, this is possible only where the secured party has separate purchase money security interests in each of two or more items of collateral and the security agreement clearly indicates that the total obligation of the debtor is allocated to the separate items of collateral. Seizure, repossession, foreclosure or surrender of the goods extinguishes the obligations of the debtor with respect to the goods affected, but leaves intact that portion of the obligation attributable to the other goods.

7. Sections 67(5) and (6) ensure that the policy underlying section 67(2) is not circumvented through the use of the money judgment enforcement system or as a result of enforcement of a lien. If the goods themselves or along with other assets of the debtor are seized, the secured party can recover in the proceedings only the gross amount realized for the disposition of the goods. This is the amount that he would have received if he had elected to enforce his security interest against the goods or had accepted surrender of them.

8. Sections 67(7) and (8) provide relief against the limitations of section 67(2) in cases where it is unjust to restrict the secured party's recovery to the value of the goods seized, repossessed or surrendered.

9. Under existing law, where the debtor is a corporation that has waived the limitations on remedies, the waiver does not affect the application of the limitation to a non-corporate guarantor of or indemnitor with respect to the obligation secured. Section 67(9) reverses this policy.

Part 6. Miscellaneous

Section 68 - Supplementary Law

The Act is not a totally self-contained code of personal property security law. There are aspects of transactions falling within the Act that are not fully regulated by the Act. For example, the common law of contracts regulates many aspects of security agreements. Further, while the Act contains provisions dealing with receiverships, it leaves to the law of equity most aspects of the regulation of court appointed receivers and many aspects of the regulation of document appointed receivers.

Section 69 - Consequences of Non-Compliance with Act

1. Sections 69(1)-(4) prescribe the remedies available to an aggrieved party when his rights under the Act have not been recognized. Generally, such person is entitled to recover damages according to the measure prescribed by the common law for breach of contract. See section 69(1).

2. Section 69(2) embodies the recognition that in some situations, it is not adequate to approach the design of remedies for non-compliance with a statutory obligation solely on the basis of the rules of contract relating to the proof and measure of damages. It may not be possible for the aggrieved party to prove actual damages as recognized by the law of contract; yet inconvenience and dislocation have been suffered. Further, there are situations in which some form of penalty, other than an order for the payment of actual damages, is necessary to encourage careful compliance with the obligations prescribed by the Act. Since the non-compliance generally results in loss or inconvenience for the person to whom the obligation is owing, it is more just and reasonable to have the penalty for non-compliance paid to the aggrieved party than to the province in the form of a fine.

3. Under section 69(2) unexcused non-compliance with specified provisions of the Act subjects the guilty party to deemed damages in an amount specified by regulations. The amount of deemed damage will not be large; it will, however, be enough to convince secured parties that the cost of intentional or careless non-compliance with the Act is greater than the cost incurred by reputable secured parties who make reasonable efforts to avoid non-compliance.
Because of potential for damage to a person named as debtor in a registration that does not accurately reflect the relationship between such person and the person who registered the financing statement, unexcused non-compliance with section 49 or 50 creates liability for deemed damages whatever the type of collateral involved and whether or not the person named as debtor is a consumer. However, unexcused non-compliance with section 17, 18, 59, 60 or 61 attracts deemed damages only when the collateral involved in the security agreement between the parties is consumer goods. The assumption underlying section 69(2)(b) is that a deemed damage remedy is needed in the context of consumer transactions because of the difficulty faced by consumers in proving legal damages (as distinct from actual damage). Where a business transaction is involved, proof of legal damages is less likely to be a problem. Note that where section 58 or 67 is involved, the collateral will necessarily be consumer goods.

4. Sections 69(3) and (4) are designed to eliminate the confusion that has developed in the context of the Personal Property Security Acts in other provinces. In at least one jurisdiction, the courts have held that non-compliance with the pre-disposition notice requirements results in the loss of the right to a deficiency. This view accords with the position taken by the courts when interpreting conditional sales legislation. In another jurisdiction, the courts have held that it does not matter how massive the non-compliance has been, the debtor must pay a deficiency. He must establish that he has suffered legal damages as a result of the non-compliance.

Sections 69(3) and (4) represent a _via media_ between these two positions. The effect of the sections is to place the onus of proof on the secured party to show that his non-compliance with section 18, 59 or 60 does not affect the debtor's ability to protect his interest in the collateral or to determine with accuracy what is the proper amount of the deficiency. Note that the onus shifts to the secured party under clause (a) of section 69(4) only in cases where the collateral is consumer goods.

The problem most frequently encountered in this context is failure to provide adequate information to the debtor so as to permit him to exercise his rights under section 62. The notice required by section 59(5) contains this information. Failure to provide the notice as required gives rise to the presumption that the debtor was unaware of his rights. However, if the secured party can demonstrate to a court that the debtor has this information (because, for example, it was contained in a noticeable form on the security agreement) the presumption of the section is rebutted.

If the failure on the part of the secured party is that he did not carry out the disposition of the goods in accordance with the Act, the presumption that the debtor has suffered damages at least equivalent to the deficiency would be more difficult to rebut. Perhaps a court would conclude that it is rebutted if proof were presented to the court that the amount actually recovered through the disposition is equal to the market value of the collateral at the date of the disposition and that the non-compliance did not affect the amount of the recovery.

Section 70 - Summary Proceedings

Experience in other jurisdictions that have Personal Property Security Acts has demonstrated the need for a summary proceeding in which matters of priority can be determined expeditiously on the basis of affidavit evidence or an agreed statement of facts. There can be little doubt that to provide expeditious and relatively inexpensive access to the courts on priority matters will result in a significant number of applications being brought at least during a short period of time after the Act comes into effect. However, this should not be a matter of concern. The availability of this type of proceeding will provide greater certainty to secured transactions in the province. The expeditious resolution of priority disputes permits the parties to secured transactions to have matters settled without costly delay. Further, it facilitates rapid development of a body of case law interpreting those features of the British Columbia Act that are unique and not subject to judicial clarification in other jurisdictions that have Personal Property Security Acts.

Section 71 - Extension of Time for Compliance

In a large number of sections in the Act, time limits for compliance are specified. However, only in the sections enumerated in section 71 or in the sections where specific provision is made can a court extend the time for compliance.

Section 72 - Service of Notices and Demands

1. This section provides guidance to parties who are instructed or required by various provisions of the Act to serve notices. See sections 18(1), 34(2), 36(11), 37(5), 38(12), 39(3), 41(4), 49(8), 50(3) and (5), 57(1), 59(4) and (8), 60(2), 61(1) and (2), and 65(2). Further, the requirements of section 72 are supplemented in some situations. See sections 18(1), 34(3), 36(12), 38(13), 39(4), 49(11), 50(6), 59(10) and 61(4).

2. It should be noted that service of notices on a corporation need not be at a place in British Columbia. Notice can be sent by registered mail to any place where the corporation carries on business.

3. Section 72(2) states a presumption of delivery where registered mail is used. This avoids difficult problems of proof of service.

Section 73 - Conflicts with Legislation in General

The Personal Property Security Act is a "code" of law dealing with security interests in personal property. Accordingly, section 73 provides that any conflicting provisions of other provincial legislation dealing with the rights of parties under security agreements are overridden by the provisions of the Act.

Section 74 - Conflicts with Consumer Protection Legislation

While this Act contains a few features that might be characterized as consumer protection measures, it does not displace provincial legislation that gives to consumers protection that goes beyond that provided in this Act.

Section 75 - References to Other Acts

While consequential amendments will be made to legislation that contains frequent reference to the Acts that will be repealed when the Personal Property Security Act is proclaimed, there will be reference to the repealed legislation or to the traditional types of security agreements in other Acts, regulations, agreements and documents. Section 75 is designed to bridge the period between implementation of the Personal Property Security Act and the time when all of the vestiges of the old system have disappeared.

Section 76 - Transition: Applicable Law

1. This section, inter alia, prescribes the applicable law in cases where security agreements created under prior law are in existence at the time the Act comes into force. Accordingly, the Act governs security agreements that are entered into after the Act comes into effect and agreements made prior to the Act coming into effect that have not been terminated at the date of proclamation of the Act. See section 76 (2)(a) and (b). However, general application of the Act to such security agreements does not necessarily mean that the Act will apply to certain aspects (validity-section 76(4)) or to specific situations (enumerated in sections 76(5)).

2. Section 76(3) provides for an exception to the basic rule stated in subsection (1) where the enforcement rights of conditional sellers and mortgagees are involved. Under the Sale of Goods on

Condition Act and the Chattel Mortgage Act, the limitations on secured creditors' remedies apply to all conditional sales contracts and chattel mortgages unless the debtor is a corporation and has waived the protection of the legislation. Under sections 58 and 67 of the Personal Property Security Act, limitations on remedies apply only where the collateral involved is consumer goods. Without section 76(3), the protection afforded to non-corporate debtors who have given security interests in equipment or inventory under a conditional sales contract or a chattel mortgage would cease as soon as the Personal Property Security Act comes into force. This would be unfair since important protective measures for such persons would be withdrawn after they had entered into security agreements.

3. There are two types of issues that must be addressed in any scheme designed to regulate transition from one system of law to another where rights can arise under each system:

(a) issues arising inter partes, principally, but not exclusively, the rights and remedies of secured parties in the event of default by debtors; and
(b) priorities among two or more security interests or the interests of other persons such as buyers and judgment creditors.

Section 76(2)(b) provides that, so far as issues arising in category (a) are concerned, the Act applies. The justification for this position is that the system for regulation of inter partes rights prescribed by the Act, which roughly parallels those established by the law of mortgages, is fair and commercially reasonable, and as such, should not prejudice secured parties or debtors. Any secured party or debtor who feels aggrieved as a result of the operation of this section may apply to a court under section 63 for an order suspending or modifying the operation of a provision of Part 5.

So far as issues in category (b) are concerned, the section leaves to prior law priority disputes in cases where the rights of all of the claimants arose under prior law or under security agreements governed by prior law. See section 76(4). However, where one or more of the claimants has rights that arose under a security agreement entered into after the Act comes into effect, the priority system of the Act applies. The justification for this approach is that the legitimate expectations of a person who acquired rights under the Act are that the Act will govern priorities. It would be very disruptive for business practice for every secured party who grants credit after the Act comes into effect to have to determine whether or not he might be in competition with a prior security interest and then have to assess his risks on the basis of the law vis-a-vis such interests and his risks on the basis of the Act vis-a-vis interests arising after the Act came into force. Further, it is very difficult to identify situations in which it is unfair or unreasonable for a prior security interest to be subjected to the priority structure of the Act. If unfairness does occur, it is more likely to be unfairness to persons other than secured creditors whose rights are diminished by the enhanced priority position generally afforded to security interests by the Act.

Section 77 - Transition: Registrations

1. The basic approach of section 77(2) is to continue the perfected status of security interests created under prior law for the balance of the registration period prescribed by prior law but to require the security interests to be perfected by registration under the Act if that perfected status is to be continued thereafter. Accordingly, subject to the exceptions set out in sections 77(3) and (4), a valid registration under the Chattel Mortgage Act, the Sale of Goods on Condition Act, and the Book Accounts Act, which has a duration of three years from the date it was effected or last renewed, will be deemed to be registered under the Personal Property Security Act for the balance of the three year registration life of the registration.

2. The system of section 77(2) does not work in all situations. There are situations in which registration under prior law is perpetual unless discharged by the registering party. In order to avoid having to maintain a separate manual document registry in perpetuity just to accommodate these types of security interests and in order to avoid confusing the public, it is necessary to have these registrations transferred to the Personal Property Registry data base and registry system. The only practical way in which this can be done is to require the re-registration of these interests in the Personal Property Registry within a specified period after the Act comes into effect.

3. Section 77(3) applies to one group of perpetual registrations: registration of mortgages under the Company Act (including section 75 registrations involving motor vehicles), registrations under the Sale

of Goods on Condition Act or Chattel Mortgage Act where the debtor is a corporation and the collateral involved is not a motor vehicle, registrations under the Book Accounts Assignment Act where the assignment is made by a corporation, registrations of conditional sales of rolling stock under which buyers are corporations and registrations of mortgages given by railway corporations. The period allowed for re-registration of these types of security agreements is five years.

Section 77(4) applies to a second group of perpetual registrations: registrations of chattel mortgages given to the Farm Credit Corporation and registrations under the Mobile Home Act. A period of three years is allowed for re-registration of these types of security agreements.

4. Section 77(5) is required because of a peculiarity of the Mobile Home Act. Under section 6(5) of this Act a floating charge affecting a mobile home is not perfected unless registered under the Act. However, section 17 of the regulations to the Act provides that a security interest by way of a floating charge "is exempt from the Act until the floating charge has crystallized and become fixed". Mortgages on mobile homes, whether in the form of floating charges or fixed charges, must be registered under the Company Act if they are given by a corporation. Under these circumstances it is necessary to specify which of the two registry statutes constitutes the applicable prior registration law: the Mobile Home Act or the Company Act. Since it is under the Company Act that an uncrystallized floating charge must be registered in the office of the Registrar of Companies, a five year period for renewal is provided for registrations of corporate mortgages on mobile homes.

5. Set out below is a summary of the requirements of section 77 as it applies to the most common types of registrations under existing law.

Registrations Under the Chattel Mortgage Act

Under sections 6 and 10 of the Chattel Mortgage Act, a mortgage given by a non-corporate debtor is registered with the Registrar General and is effective for a period of three years. This type of registration will be subject to section 77(2) of the Personal Property Security Act and is effective for the balance of the three year period remaining after the Personal Property Security Act is proclaimed in force.

Under section 7 of the Chattel Mortgage Act, there are three types of registrations contemplated:

(a) chattel mortgages granted by corporate debtors where no motor vehicles are collateral. Under section 77(3)(a)(iii) this type of registration is effective for a five year period.

(b) chattel mortgages granted by corporate debtors where the collateral is motor vehicles. Since there is no special rule dealing with this situation, subsection (2) of section 77 applies and the registration, which under section 10 of the Chattel Mortgage Act has a registration life of three years, is effective for the balance of the three year period remaining after the Personal Property Security Act is proclaimed in force.

(c) chattel mortgages granted by corporate debtors where the collateral is motor vehicles and other types of personal property. While section 7(1)(c) of the Chattel Mortgage Act states that such a chattel mortgage is to be registered in the offices of both the Registrar of Companies and the Registrar General, it is clear from section 7(2) that registration in the office of the Registrar of Companies relates only to the non- vehicle collateral and registration in the office of the Registrar General relates to the vehicle collateral. Accordingly, section 77(3)(a)(iii) of the Personal Property Security Act applies to the security interest created by this type of mortgage in the non-vehicle collateral and section 77(2) applies to the security interest in the vehicle collateral.

In order to perpetuate the perfection of this type of mortgage to the extent that it applies to motor vehicles, the secured party will have to register a financing statement at the expiry of the balance of the three year registration period applicable under section 77 to the mortgage on vehicles. He may at that time draft his financing statement to refer to both vehicle and non-vehicle collateral. If he does, he avoids the necessity of having to register an additional financing statement relating to the non-vehicle collateral five years after the Personal Property Security Act comes into force. If he does not, he will be required to register the additional financing statement at this time.

Under section 77(4), registrations of chattel mortgages held by the Farm Credit Corporation, which under the Chattel Mortgage Act currently have perpetual registration, are valid for a period of three years after the Personal Property Security Act comes into force.

Registrations under the Sale of Goods on Condition Act

Section 4 of the Sale of Goods on Condition Act is identical in effect to section 7 of the Chattel Mortgage Act. Accordingly, the explanation set out above with respect to the Chattel Mortgage Act applies as well to registrations under the Sale of Goods on Condition Act.

Registrations Under the Book Accounts Assignment Act

The registration of an assignment made by a non-corporate debtor falls within the general rule of section 77(2) of the Personal Property Security Act and is valid for the balance of the three year period provided in section 8 of the Book Account Assignment Act remaining after the Personal Property Security Act comes into force.

The registration of an assignment made by a corporate debtor falls within section 77(3)(iv) of the Personal Property Security Act and remains in force for a period of five years after the Personal Property Security Act comes into force.

Registrations Under the Mobile Home Act

Registrations of security interests in mobile homes, other than security interests in the form of floating charges and other corporate mortgages, fall within section 77(4) of the Personal Property Security Act. The effect of this section is to recognize the continuing validity of such registrations for a period of three years after the Personal Property Security Act comes into effect.

Security interests in mobile homes that have become fixtures must be registered in the Land Title Office as provided in sections 11-14 of the Mobile Home Act. Such registrations are adequate for the purposes of section 36 of the Personal Property Security Act. Consequently, by virtue of section 77(2) they are perpetuated under the Personal Property Security Act for so long as the original mobile home registration remains undischarged.

Registrations of floating charges and other corporate mortgages on mobile homes are given a five year period for registration.

Registrations Under the Company Act

All registrations under the Company Act, including registrations of security interests in motor vehicles which under section 75(4) are effected with the Registrar General, are, by virtue of section 77(3)(a) and (b) perpetuated for a period of five years after the Personal Property Security Act comes into force.

6. Section 77(6) addresses another type of situation with respect to which the approach used in subsection (2) is inadequate. If under prior law a security interest was perfected without registration or possession of the collateral by the secured party and the security interest is of a kind that must be perfected by registration or possession under the Act (e.g. a lease for a term of more than one year, a commercial consignment, a security lease or a security consignment), an approach similar to that used in the context of perpetually perfected security interests must be employed. Under subsection (6) holders of such security interests are given a grace period of three years to comply with the Act. During this period, third parties who rely on the Personal Property Registry for information are at risk. However, this is unavoidable unless no grace period is given for such security interests.

7. Section 77(8) provides for perfection by possession of security interests in chattel paper. Under existing law chattel paper is not recognized as a type of collateral itself and therefore a security interest in it cannot be perfected by possession. Section 77(8) recognizes that for the purposes of the Act, an interest in chattel paper can be perfected by possession of the chattel paper taken before or after the Act comes into effect, even though the interest arises under prior law.

8. In a few situations, the Act permits temporary perfection without registration or possession. Subsections (9) and (10) are designed to facilitate transition from a system under which these types of interests must be registered to the system of the Act.